The Enforcement of International Law Through Municipal Law in the United States

BY

PHILIP QUINCY WRIGHT
A. B. Lombard College, 1912
A. M. University of Illinois, 1913

THESIS

Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Political Science in the Graduate School of the University of Illinois.

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PREFACE

The theory of international law upon which this study is based may be briefly summarized in a few statements. With the present system of world organization, effective enforcement of law is only possible through action by state administrative and judicial organs. International law, therefore, can not be effectively enforced except over persons subject to the jurisdiction of the state. We may therefore conclude that international law can be effectively enforced only in so far as it prescribes conduct for persons and subordinate agencies of government.

The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons. International law, therefore, should be regarded as the law binding the members, both persons and states, of a "supra-national" state or a "community of nations", the enforcement of which is delegated to the organs of the states composing it. The German Constitution, with its system of imperial law, binding on individuals but enforced largely through the administrative officers and courts of the component states, furnishes an illustration of such a system.

The recognition of this fact, that international law reaches down to individuals, is, therefore, important. International law can become effective through state enforcement in proportion as it lays down obligations for persons, rather than for states. Much of it now consists of rules prescribed for persons and officers of government and the greater part of it can be described in terms of such rules because the state can only act through human agencies. When we say that a state is obliged to do or abstain from doing certain acts, we can only mean that its chief executive officer, or its legislature, or its courts are bound to observe certain rules, which, by proper constitutional checks, it is possible for municipal law to enforce.

With this conception, that international law prescribes rules of conduct for persons and public officers and imposes obligations upon states, to enforce them, we shall consider the rules of municipal law enforced in the United States in pursuance of this international obligation.

The distinction between a legal and a political method of

enforcement has been kept in mind. Where action is left to the discretion of military, naval or executive officers or legislative bodies as cases arise, the rule is not considered one of municipal law. The term is only applied to the rules laid down as permanent and enforceable by governmental authority according to an established procedure, either judicial or administrative.

The title to be given this study caused the author much perplexity, and doubtless the one finally decided upon is open to criticism. Mr. A. V. Dicey entitled his book on private international law, "A Digest of the Law of England with reference to the Conflict of Law." Perhaps this thesis could be entitled "A Digest of the Law of the United States with reference to International Law." Such a title, however, would imply a more or less exhaustive treatment of the subject. The present work does not pretend to digest the whole of the law of the United States relating to the enforcement of international obligations. It is intended merely to suggest a field which the writer believes will bear further exploration. The title first considered was "The Extent to which International Law is Incorporated into the Law of the United States." Such a title would have excluded consideration of the rules which we have designated as laws supplementary to international law. These are municipal law enforcing international obligations but are not rules of international law incorporated into municipal law. The title finally settled upon is certainly inclusive enough and indicates that discussion is limited to the rules of international law enforced as *law* in the United States, excluding those enforced by executive authorities as "political questions."

The general subject of the relationship of international to municipal law has not been extensively considered in any English treatise. Holland's excellent article on "International Law and Acts of Parliament" published in his "Studies on International Law" is a brief but valuable contribution. Professors J. B. Scott and W. W. Willoughby in articles in the American Journal of International Law, Westlake in an article entitled, "Is International Law a part of the Law of England?" published in the Law Quarterly Review, and Lawrence in his "Essays on some disputed Questions of International Law" have discussed the nature of international law and its relation to municipal law, especially to the judiciary. Since this work was completed an excellent discussion of "The Relation of International Law to the Law of England and of the United States of America" by C. M. Picciotto has been published. This writer deals especially

with the relative legal force of statutes, executive orders, treaties and customary international law in the courts of England and the United States. Walker in his "Science of International Law", Westlake in his "Principles" as well as in his more recent work on "International Law", and A. H. Snow in several articles in the American Journal of International Law have emphasized the idea that international law is law governing individuals regarded as members of a society of nations, rather than law simply *between* nations, as the name suggests. The last writer in fact suggests the term "supra or super national" as a more appropriate term.

Writers on jurisprudence have sometimes considered the subject but usually very briefly. With Austin's example before them, they have excluded international law from the scope of their subject. Gray's "Nature and Sources of the Law" and Stephen's "History of the Criminal Law of England" contain particularly lucid expositions from this standpoint.

The most important contributions to the subject are in German. H. Triepel in his "Völkerrecht und Landesrecht" considers the nature, sources and relationship of international and municipal law. W. Kaufmann, in "Die Rechtskraft des Internationalen Rechtes und das Verhältnisse des Staats Organs zu demselben" covers somewhat the same ground, but emphasizes particularly the legal authority of international law and treaties as immediate sources of municipal law.

In the present work, the writer has attempted to discover the actual situation in the United States, with only incidental reference to the theoretical relationship of the two branches of jurisprudence. Primary reference has therefore been made to the treaties, statutes, executive orders and court decisions of the United States. Had it not been for the orderly arrangement of much of this material in Moore's "Digest of International Law", a monumental contribution to the science, the work would have been practically impossible. Moore's International Arbitrations have also been used, as have the collections of cases by Freeman Snow, J. B. Scott, Pitt Cobbett, and Norman Bentwich. Much use has also been made of the annual publications of the Naval War College, in which numerous points of prize law have been exhaustively discussed with especial reference to the practice of the United States. Professor C. G. Fenwick's recent work on the Neutrality laws of the United States has been constantly referred to in dealing with that subject. Tucker and Blood's edition of the Penal Code of 1910, Davis's edition of the Military

Laws and Howland's Digest of Opinions of the Judge Advocates General, all exhaustively annotated, have also been of assistance. The standard treatises on international law, of which those by Professors G. G. Wilson and Amos S. Hershey are particularly rich in references illustrative of American practice, have, of course, been examined.

The work has been carried through under the guidance of Professors J. W. Garner and Walter Fairleigh Dodd, to both of whom the author wishes to make grateful acknowledgement for many suggestions and much helpful criticism.

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TABLE OF CONTENTS

INTRODUCTION

POSSIBILITY OF ENFORCING INTERNATIONAL BY MUNICIPAL LAW

It is the purpose of this thesis to discover how and to what extent international law is enforced by municipal law in the United States. For an adequate treatment of the subject a more or less definite meaning must be attached to the terms municipal law and international law. This is all the more necessary because, with a common view of these two branches of jurisprudence, our inquiry would be not only fruitless but impossible. Thus there is a common opinion which limits the connotation of international law to relationships between states regarded as independent political communities, exclusively.[1] With this view the state is regarded as a unit, an organism whose control is concentrated in a single will designated by the term sovereignty. It is with sovereigns alone that international law has to do.

Municipal law on the other hand is held to be law within the state. The sovereign enforces it but can not be bound by it. As well say that a dynamo can drive the engine which moves it, as to say the sovereign power can be controlled by the municipal law

[1]See Bentham, "With regard to the political equality of the persons whose conduct is the object of the law. They may, on any given occasion, be considered either as members of the same state, or members of different states. In the first case the law may be referred to the head of internal; in the second case to that of international jurisprudence. Now as to any transactions which may take place between individuals who are subjects of different states: those are regulated by the internal laws and decided upon by the internal tribunals of the one or the other of these states, the case is the same where the sovereign of the one has any immediate transaction with a private member of the other. * * * There remains, then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international law." Introduction to Principles of Morals and Legislation, Works, Bowring, Ed., 3;149. See also Travers Twiss, Law of Nations considered as Independent Political Communities, Oxford, 1884, p. 2; T. E. Holland, The Elements of Jurisprudence, 11th ed., N. Y., 1910, pp. 385-389, 402.

it makes and enforces.[2] How then can municipal law enforce international law? Clearly with this conception of international law it can not.

Although this theory of international law is often enunciated, it is never adhered to in discussions of the subject with the meaning just outlined. All writers on international law discuss rights and duties of ambassadors and consuls, of armed forces, of aliens, of neutral vessels in time of naval war, etc. International law as well as municipal law contains rules relating to the conduct of persons. Were such rules omitted from the subject, international law would be reduced to a few precepts telling when a state may make war, how far it may exercise jurisdiction, and how and when it may acquire territory, some of which on investigation would be found to be rules of policy rather than of law.

International law is not to be distinguished from municipal law by the assertion that the former relates to the conduct of states, the latter to the conduct of individuals within the state. Not state conduct, but state responsibility is the criterion of international law. International law prescribes rules of conduct which the individual must observe, but if he fails to observe them it pays no attention to the individual but declares that the state of which he is a member is responsible and liable. All rules, for the breach of which states will be held liable, are rules of international law.

Thus international law and municipal law are not mutually exclusive. The same rules may be prescribed by both. Both international law and the municipal law of the United States say

[2]Cf. Justice Holmes, a "A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," Kawananako vs. Polyblank, 205 U. S. 349, 353, (1907), citing Hobbes, Leviathan, ch.226, 2; Bodin, Republique, 1, ch.8, ed. 1629, p. 132; Sir John Eliot, De Jure Maiestrate, c3; Baldwin, De Leg. et Const., Digna Vox, 2nd ed., 1496, fol, 51 b, ed. 1539, fol. 61. See also American Banana Co. vs. United Fruit Co., 213 U. S. 347; John Austin, Lectures on Jurisprudence, 5th ed., London, 1911, 2 vols., 1;263, 278; J. C. Gray, The Nature and Sources of the Law, N. Y., 1909, pp. 77-81; T. E. Holland, The Elements of Jurisprudence, 11th ed., N. Y., 1910, pp. 53, 365; J. W. Salmond, Jurisprudence, 2nd Ed., London, 1907, p. 110, 475-481; J. C. Calhoun, Disquisition on government, Works, vol. 6, Columbus, 1851, 1;146; J. W. Burgess, Political Science and Comparative Constitutional Law, Boston, 1902, 2 vol., 1;53.

that inhabitants of the United States shall not "set on foot military expeditions" when the country is neutral, and that naval forces shall not interfere with neutral commerce in time of war except for breach of blockade, carriage of contraband or similar cause. Municipal law, however, holds the individual criminally liable for setting on foot a military expedition[3] and the naval officer liable in damages for making a seizure without probable cause,[4] while international law in both cases requires the United States to make reparation to the injured states if these acts occur.[5] We believe therefore that it is possible for municipal law to enforce at least a part of international law so far as the obligations of that state are concerned.

RELATIONSHIP OF INTERNATIONAL AND MUNICIPAL LAW

International law consists of rules prescribing the conduct of persons, agencies of government and states, for breaches of which states are held liable.[6] This definition is undoubtedly

[3]Act Apr. 20, 1818, Rev. Stat., sec. 5286.

[4]Little vs. Barreme, 2 Cranch 176, (1804); The Thompson, 3 Wall., 155; The Dashing Wave, 5 Wall. 170. See Moore's Digest, 7; 593-598.

[5]Hague Conventions, 1907, v;art. 4; Declaration of London, 1909, art. 64.

[6]A number of different points of emphasis are made in definitions of international law. All agree that it consists of "rules of conduct regulating the intercourse of states" (Halleck, Int. Law, 3rd ed., 1;46). Many however enlarge this definition in its most limited sense, by emphasizing the fact that international law may prescribe conduct for persons, (Hershey, Int. Law, p. 1; Westlake, Int. Law 1, p. 1; Principles p. 1; Bonfils, Droit Int, pp. 2, 79). Walker, (Science, p. 44) emphasizing this idea, says, "International laws are rules of conduct observed by men toward each other as members of different states though members of the same international circle." Most writers, however, restrict the connotation of the term by requiring that the rules conform to some standard of objectivity. "*Actual observance*" is frequently considered enough (Bonfils, p. 1; Walker, Science, p. 44). Lawrence (p. 1) and Bonfils (p. 2) require that the rules "*determine conduct*", Westlake (Prin. p. 1) that they "*govern* the relations of states", Hershey (p. 1) that they be "*binding* upon the members of the international community". Exactly how any of these standards can distinguish international law from international morality, it is difficult to see. They are so vague as to be almost meaningless. Hall's insistence that nations must "have *consented* to be bound" (p. 5) is more definite, while Holland (Studies, p. 194) is even more concrete when he says, "the law of nations * * is the public opinion of the governments of the civilized world with reference to the rights which any state would be

exceedingly vague. It is often difficult to tell whether a state will be held liable for the infraction of a particular rule or not. Often if weak it will, if strong it will not. There is no authoritative tribunal for defining rules of international law and saying for this act of a person or of an officer the state is responsible, for this it is not. The only test is that of actual practice. Where responsibility is habitually acknowledged or, in other words, where the consensus of opinion among nations recognizes that responsibility exists, the rule is one of international law.

Even more vague than the scope of international law is its sanction. The enforcement of the liability of states is not insured by any legal procedure. Such pressure as the inertia of habit, public opinion, commercial or military reprisal, threats of war, etc.,[7] alone compels states to observe international law, to enforce its observance among their subjects and, within their territory,

justified in vindicating for itself by a *resort to arms.*" Some writers emphasize the idea that international law is not real law. Holland calls it "public opinion", (Studies, p. 194), Austin, "international public morality" (1; 173, 226), Stephen (History of Crim. Law, 2;25) and Gray (Nature and Sources of the Law p. 125) convey a similar idea. It seems to us that such assertions are inappropriate in a definition of international law. Usage has applied the term so consistently that it would seem more proper to enlarge the definition of law so as to include international law. However, such definition may serve the useful purpose of indicating that the sanction of international law is different from that of municipal law, which is the significance given by these writers to the term "law". Our definition is doubtless as open to the criticism of vagueness as any. We make no immediate limitation according to the character of the parties obligated. Any rule of conduct is a rule of international law, if *states are held liable.* This connotative limitation under present conditions implies an exclusion of rules relating to parties of a certain character, for instance those defining relationships between persons of the same state or persons and their own government, because such matters being entirely internal, other states have no interest in exacting a liability. There have, however, been attempts to include *res interna* in international law, for example the principle of legitimacy by the Quadruple Alliance of 1815. If state liability were actually recognized, in such matters, they would become rules of international law. By the phrase "are held liable" we mean to assume an inductive and objective standard, requiring actual practice for the proof of this condition, and also a subjective standard similar to Holland's that opinion must recognize a resort to force as justifiable in enforcing this liability, a condition which is of course incapable of more than very indefinite verification.

[7]See Elihu Root, "The sanctions of International Law", Am. Jour. Int. Law, 2;451 (1908).

to acknowledge their liability and to make adequate reparation for infractions of its precepts.

But although it is difficult to tell what rules are within the field of international law and what sanctions enforce the liability of states, it is easy to state definitely many of the rules themselves and to show how they are actually enforced. This statement appears self-contradictory, yet there are many rules relating to diplomatic intercourse, condemnation of prizes, etc., which are capable of being stated in definite terms and are enforced by definite legal methods. They are also rules of international law; at least states have habitually acknowledged responsibility for their infraction.

For the definite statement and legal enforcement of international law we look to the municipal law of states. Municipal law consists of all general rules which the state enforces.[8] The most common agents of enforcement are judicial tribunals, but a rule enforced by an authoritative executive or administrative pro-

[8]Writers on general jurisprudence commonly give a similar definition to the term "law". Gray (Nature and Sources of the Law, p. 82) says, "the law of the state * * is composed of the rules which the courts * * lay down for the determination of legal rights and duties." Salmond (Jurisprudence p. 9) says, "The law is the body of principles recognized and applied by the state in the administration of justice". Both of these definitions recognize state enforceability as the most important feature of municipal law. Austin's conception (Lectures on Jurisprudence, 1;79, 88) was essentially the same although he emphasized the fact that the state "commanded" law rather than that it enforced it, thus being forced to the awkward explanation that "what the sovereign permits he commands" (2;510) to explain judge-made law. Maine's criticism (Early Hist. of Inst., pp. 377-387) that customary law is neither commanded nor enforced by the sovereign and can not be altered by him, seems to confuse the titular with the real sovereign. If customary law is applied in the village tribunals it is being enforced by the "sovereign" in the sense of political science even though Runjeet Singh, the titular sovereign, does not enforce it and can not alter it. Walker (Science of Int. Law, p. 44) attempts to parallel his definition of municipal with that of international law and says "municipal laws are rules of conduct observed by men or by men recognized as binding toward each other as members of the *same state*". He does not recognize positive state enforceability as necessary and he also limits the connotation of the term to rules between members of the same state. We disagree with him in both of these points. We intend to include as municipal law *all rules* of conduct binding either citizens or aliens, enforced by the state, either through a central or local authority, so long as this authority is recognized as legitimate.

cedure is no less municipal law. The rules of international law, so far as they lay down rights and duties of persons and officers, may be enforced by municipal law either directly through the application of international law by the court and executive officials or indirectly through the coercion of persons and officers in a manner not immediately prescribed by international law but calculated to cause an observance of the international duty.

It is true that they may not be. A state has entire control of its own municipal law and whether or not it chooses to enforce rules of international law, depends upon the force of the international sanctions pressing upon it.[9] But if it does enforce them, it thereby enforces its own duties under international law, and in so far as this enforcement is effective and complete it escapes liability under international law. It also gives legal definition and sanction to these rules.

It is thus an obligation, imposed by international law itself upon states, to enforce that part of international law relating to the conduct of persons within their jurisdiction, through their municipal jurisprudence.[10] It is for states to supply the lack of a world administration for the execution of international law.

[9]See W. W. Willoughby, The Legal Nature of Int. Law, Am. Jour. Int. Law, 8;357, in answer to an article of the same title by J. B. Scott, Am. Jour. Int. Law, 1;831. Also Westlake, Is Int. Law part of the Law of England?, Law Quar. Rev., 22; 14-26; Holland, Studies in Int. Law, p. 195.

[10]See judicial decisions on this subject, Res Publica vs. DeLongchamps, 1 Dall. 111; Talbot vs. Seamens, 1 Cranch 1, 37 (1801); Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191; The Scotia, 14 Wall. 170, Scott 17; Hilton vs. Guyot, 159 U. S. 113; The Paquete Habana, 175 U. S. 677, Scott, 19. In Murray vs. the Charming Betsy, 2 Cranch 64, the court said that municipal law ought to be interpreted in harmony with international law if possible. English cases—Triquet vs. Bath, 3 Burr. 1478, Scott, 6; Heathfield vs. Chilton, 4 Burr. 2015, Scott 189; Le Louis, 2 Dods. 239, Scott 352; Emperor of Austria vs. Day, 2 Giff. 628; In the Recovery, 6 Rob. 348, the court even went so far as to assert that prize courts must apply international law in opposition to municipal statutes. This view was not maintained in West Rand Central Gold Mining Co. vs. Rex, L. R. 1905, 2 K. B. 391, Bentwich 1, which held that an act of state prevented the application of conflicting rules of international law. Regina vs. Keyn, L. R. 2 Ex. 63. Bentwich, 6, held that international law could not operate to increase jurisdiction; and Mortensen vs. Peters, 14 Scot. L. T. R. 227 (1906), Bentwich 12, applied a statute extending jurisdiction beyond the limits permitted by international law. See discussion of prize cases on this point, Holland Studies, pp. 193-199.

As state courts of the United States enforce the federal constitution, laws and treaties, so it is the duty of independent governments to see that their courts enforce international law and that their executive authorities execute it.

It must not be overlooked that there are rules of international law which are incapable of enforcement as municipal law. Those which prescribe rules of conduct which the state considered as a unit must do or refrain from are directed solely to the sovereign power in the government. The commencement of war, the recognition of foreign states and governments, the submission of questions to arbitration, the acquisition of territory, the extension of jurisdiction are of this character. They are political questions and beyond the power of municipal law to control. The observance of such rules is in the hands of discretionary officers. In the United States congress and the president are responsible for the observance of such rules by the United States and they can not be coerced by municipal regulations. It is true that in these matters the political organs of the government act according to legal precedents as well as dictates of pure policy. But their action in either case is beyond the scope of municipal law and of our subject.

We are concerned with the rules of international law enforced directly as law in the United States and those enforced indirectly by the enforcement of laws supplementary to international law. The precedents and procedure followed by political organs of government in settling these political questions will not, therefore, be considered.

CLASSIFICATION

The doctrine of responsibility of states, which is the essence of international law, presents two possible methods of viewing the matter. We may consider the rule itself of primary importance; and thus private persons, ambassadors, consuls, military forces, naval forces, etc., as well as states would be subjects of international law for whom different rights and obligations are prescribed. On the other hand we may consider the liability or enforcement of the rule as of primary importance; and states, which are alone responsible, as the only subjects of international law. We should then describe the rights and duties of states, with reference to these various classes of officers and persons, considering them as objects of international law.

The latter is the course commonly pursued. States are said

to be the only subjects of international law. Persons and public officers as well as territory and other kinds of property are its objects.[11]

In our own opinion there is much to be said for the first view. There is a tendency for international law to impose a direct responsibility upon persons and officers[12] and if it is ever to be law in the Austinian sense of the term, this view will have to be recognized. The possibility of an effective law binding states as such was exhaustively discussed in the federal convention of 1787,[13] and the impossibility of enforcing such a law by ordinary lagal processes was demonstrated prior to the civil war. Even corporations when of considerable magnitude have proved surprisingly difficult things to control by law. A corporation or a state can neither be brought to court, nor put in jail. Law can never act upon it more than imperfectly.

As it is, however, the responsibility of states is the predominant feature of international law, and we will adhere to the usual custom of classifying the branches of that subject according to the rights and duties of states.

It is possible to discuss any body of law in terms of either rights or duties; either privileges or obligations; either liberties or restrictions. Every right implies a duty on the part of others

[11]See Lawrence, Int. Law, p. 73, "Probably it is best to say with Oppenheim (Int. Law, 1; 344) that persons, like territory, are objects of International law, and reserve the term subjects for those artificial persons who are either sovereign states or communities closely akin to them through the possession of some of the distinguishing marks of statehood."

[12]See, for instance, Hague Conventions 1907, in which occur such expressions as "Every prisoner of war is bound to give, etc." (IV, Art. 9) "a belligerent war ship may not prolong its stay, etc." (XIII, Arts. 14, 16, 18, 19, 20).

[13]See James Madison, The Journal of the Debates in the Convention which framed the Constitution of the United States, Gaillard Hunt, ed., N. Y., 1908, 2 vol., also in Madison, Works, Hunt, ed., vol. 3; Elliot, Debates, vol. 5; Farrand, The records of the Federal Convention of 1787, New Haven, 1911, Remarks by Madison, May 31, Wilson, June 25, King, July 14. Strong, July 14, says, "The practicability of making laws with coercive sanction for the states as political bodies had been exploded in all hands". See also Madison letter to Jefferson, Works, 1;344: The Federalist, Nos. 15, 16, 21, P. L. Ford, ed., pp. 87, 90, 91, 97, 123. A. C. McLaughlin, The Confederation and the Constitution, Am. Nation Ser., vol. 10, pp. 242, 245. The constitution of the German Empire does provide for the legal coercion of states through a process known as "Federal Execution", but the law of the empire acts directly on individuals.

to expect its observance. Treatises on international law, as on all other departments of law, commonly treat parts of the subject by describing duties, other parts by describing rights. In fields where liberty of action is the rule and restriction the exception, convenience dictates a treatment from the standpoint of duties, while when the reverse is true, when restriction is the rule and liberty of action the exception, a treatment from the standpoint of rights is most conservative of space.

For our purposes, however, a classification based exclusively on duties is necessary. Our purpose is to discover what obligations of international law are enforced by municipal law. We will therefore attempt to cover the whole field of international law from the viewpoint of duties. We will not consider the rights of the United States as such, but only in so far as they imply a duty to respect equivalent rights of other states.

Looking at international law as imposing obligations upon states, some of these obligations require action or abstention on the part of the government, while others require the state to enforce action or abstention on the part of its citizens or public officers. Duties of the first character are considered under four heads, abstention, acquiescence, vindication and reparation, those of the second under the head prevention.

The international obligations of a state differ somewhat according to differences in status caused by the advent of wars. Four general divisions are thus suggested—obligations in time of peace, obligations as a neutral, obligations as a belligerent toward neutrals and obligations as a belligerent toward enemies.

The questions relating to the transition from war to peace, peace to neutrality, etc., as well as to the advent of new states, involve the subject of recognition. This is a political question. Municipal law does not lay down rules saying when states shall be recognized, when belligerency and insurgency exist, and when they cease. In these matters the municipal law of the United States follows the political departments of the government as has been repeatedly affirmed by the courts.[14] It adjusts itself to the new status and recognizes the new condition.

[14]Rose vs. Himely, 4 Cranch 241 (1808); Consul of Spain vs. the Conception, Fed. Cas. 3137 (1819); Gelston vs. Hoyt, 3 Wheat. 246, 324 (1818); U. S. vs. Palmer, 3 Wheat. 610 (1818); The Divina Pastora, 4 Wheat. 52; Foster vs. Neilson, 2 Pet. 253, 307; Keene vs. McDonough, 8 Pet. 308; Garcia vs. Lee, 12 Pet. 511; Williams vs. Suffolk Ins. Co., 13 Pet. 415 (1839); Kennet vs. Chambers, 14 How. 38 (1852); The Prize Cases, 2 Black 635; U. S. vs. Yorba, 1 Wall. 412; U. S. vs. Lynde, 11 Wall. 632;

These matters are therefore beyond the scope of our subject. We will take the conditions of peace, war and neutrality for granted and discuss the municipal measures for enforcing national duties in each of these conditions, classifying such duties under the five heads, abstention, acquiescence, prevention, vindication and reparation.

The Ambrose Light, 25 Fed. Rep. 408 (1885); Jones vs. U. S. 137 U. S. 202 (1890); The Three Friends, 166 U. S. 1 (1896); Underhill vs. Hernandez, 168 U. S. 250; Ex Parte Toscano, 208 Fed. Rep. 938 (1913). English cases—The Pelican, Edw. Adm. Appdx. D., Taylor vs. Barkley, 2 Sim. 213; Emperor of Austria vs. Day, 2 Giff 628; Republic of Peru vs. Peruvian Guano Co., 36 Ch D. 489, 497; Republic of Peru vs. Dreyfus, 38 Ch. D. 348, 356, 359.

PART I. OBLIGATIONS IN TIME OF PEACE

CHAPTER I. INTRODUCTORY

The obligations imposed upon states in time of peace are in general derived from one fundamental conception, which may be summarized as the principle of territorial independence or territorial sovereignty.

Modern international law was impossible until the idea that government and jurisdiction are inseparable from territory had received recognition. It is true that these propositions are not universally held now. The principle that jurisdiction extends by race or nationality and by the nature of the act rather than by territory is still asserted and acted upon in claims of jurisdiction over citizens abroad and over any one committing offenses against the state or its citizens. It is, however, believed that these claims are to be regarded as exceptions to the general rule of territorial jurisdiction. The triumph of the theory of territoriality in jurisdiction and government is assured by the fact that power of coercion, physical force, is the foundation of both of them, and effective coercion is by the nature of things exclusive within one territory. We will therefore regard the following propositions as the norms of the law of peace: (1) A state occupies a definite portion of territory. (2) Within that territory it may organize itself, dispose of its land, resources and wealth, and control the conduct of the inhabitants with perfect freedom. This may be stated by saying that within its territory it has unlimited powers of government, property and jurisdiction. (3) Outside of that territory its power ceases.[1]

[1]On the theory and necessity of territorial sovereignty see J. W. Burgess, Political Science and Comparative Constitutional Law, Boston, 1898, 1;52; Joseph Story, Commentaries on the Conflict of Laws, 8th ed., Boston, 1883, pp. 8-9, 21-24; J. W. Salmond, Jurisprudence; 2nd ed., London, 1907; p. 99; Justice O. W. Holmes, in American Banana Co. vs. United Fruit Co., 213 U. S. 347 (1909); W. E. Hall, International Law, 4th ed., London, 1895, pp. 20-21, 45-46. J. E. Feraud-Giraud, Etats et Souverains devant les tribunaux étrangers, Paris, 1895, 1;31-36 discusses the necessary exemption of states from foreign jurisdiction.

These conditions are in fact imaginary. They could in completeness be realized only if all states were as isolated as the planets. This not being true, they are subject to numerous exceptions, necessitated by the inevitable peaceful intercourse of states and their subjects, and the necessary concurrent extension of authority by all states over the high seas, which are within the territory of no state, and which by physical facts can not be so appropriated. States better than human individuals accord with Herbert Spencer's theory of liberty,[2] but even in their case we must modify this absolute right of liberty by the proviso that a like liberty be accorded to others.

It is the determination of these exceptions to the ideal condition of absolute territorial independence which forms the body of the law of peace. Were there no exceptions, obviously there would be no more need for law regulating relations between states than there is for law regulating relations between the inhabitants of the earth and the inhabitants of Mars. Consisting of rules governing exceptions to the general rule, the law is ordinarily expressed in terms of rights. Thus we speak of the state's right to a limited jurisdiction over its subjects abroad, and over its merchant vessels on the high seas, and its exclusive right of jurisdiction over its ambassadors, public vessels and armed forces abroad. We propose, however, to look at the matter from the reverse side of duties. We are not interested in the laws of the United States providing for the exercise of rights as such; but as they indicate the limits of these rights, and imply an obligation of the United States not to exceed them.

The obligations of states under international law may be classified under five heads: (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5) reparation. A state is under the obligation to *abstain,* with a few exceptions, from the exercise of authority outside of its territory, to *acquiesce* in the exercise, within its territory, of authority by foreign states in a few cases, to *prevent* its citizens and public officers from doing acts injurious to foreign states and their subjects, to *vindicate* its sovereignty and position in the family of nations by treating violations of international law by foreign persons or officers in a manner prescribed by international law, and to make *reparation* for breaches of international law by its citizens or public officers.

[2]Herbert Spencer, Social Statics, together with Man versus the State, New York, 1910, p. 36.

CHAPTER II. OBLIGATIONS OF ABSTENTION

INTRODUCTORY

The obligations of abstention are derived from the fundamental principles of international law. The state is bound to abstain from the exercise of sovereignty and jurisdiction over acts or persons in any but its own territory, with a few exceptions. These duties relate primarily to the conduct of the government. If the government chooses to ignore them by sovereign acts such as intervention or conquest, municipal law can have no restraining effect. Statutes, treaties, and court decisions, have, however, expressed legal limitations upon the extension of power outside of the territory, and, until changed by a sovereign act, are laws enforcing the duty of abstention as against the government. By their mere statement as law, these limitations tend to be observed by the sovereign power, and, of course, may be enforced by coercive measures as against inferior officers of government.

The obligations of abstention may be considered under the three heads, (1) acquisition of territory, (2) use of force against foreign states or their subjects, (3) exercise of jurisdiction outside of the territorial limits.

ACQUISITION OF TERRITORY

(1) The right to acquire unoccupied territory or territory occupied only by savages is generally recognized by international law and has been affirmed by the law of the United States. In the Declaration of the Berlin congress of 1885 it was provided that territory in Africa should only be acquired with effective title after notification and actual occupation. The United States signed this declaration, but as it was not submitted to the senate for ratification it is not a binding treaty.[1] The claims of the Indians to territory has been held to be no bar to the rights of acquisition by civilized nations through discovery and occupation, in a number of cases.[2] The acquisition of unoccupied guano islands by action of citizens of the United States was provided

[1]See Moore's Digest 1;267.

[2]Johnson vs. McIntosh, 8 Wheat. 543 (1823); Martin vs. Waddell, 16 Pet. 367; Mortimer vs. N. Y. Elevated R. R. Co., 6 N. Y. S. 89 (1889); Ketchum vs. Buckley, 99 U. S. 188.

for by statute in 1856,[3] under conditions designed to prevent such acquisition of islands already under the sovereignty of foreign states, but the fact that another government had formerly occupied an island and subsequently abandoned it was held no bar to its acquisition under this act.[4]

(2) The acquisition of land by accretion, or the gradual and imperceptible building up of territory by rivers or ocean tides has been upheld as conferring legitimate title by the United States courts in the case of private owners and states of the union,[5] a view which implies an acquisition of sovereignty over such accretions by the United States. This method of acquisition was supported in an English case which acknowledged the sovereignty of the United States over mud islands formed near the mouth of the Mississippi.[6]

(3) Prescription has been held to confer good title to territory claimed by states,[7] and by individuals as against the government.[8] It has also been impliedly recognized as founding good title in various boundary treaties of the United States.[9]

(4) The acquisition of land by conquest was denounced in resolutions proposed at the International American congress in Washington, 1889-1890, which stated "that the principle of conquest shall not, during the continuance of this treaty of arbitration, be recognized as admissable under American Public Law."[10] The United States acceded to the resolution, but as the plan of

[3]Act. Aug. 5, 1856, Rev. Stat. 5570-5578.

[4]Jones vs. U. S. 137 U. S. 202, 220, (1890). See Moore's Digest, 1:299, 556-580.

[5]Ocean City Association vs. Schwer, 46 Atl. Rep. 690, (N. Y. 1900); Mulry vs. Norton, 100 N. Y. 424; Wallace vs. Driver, 61 Ark. 429; Jeffries vs. East Omaha Land Co., 134 U. S. 178, 191, (1890); St. Louis vs. Rutz, 138 U. S. 226, (1891); Nebraska vs. Iowa, 143 U. S. 359, 368, (1892).

[6]The Anna, 5 Rob. 373. (1805). See Moore's Digest, 1;269-273.

[7]Rhode Island, vs. Mass., 4 How. 591, 639, (1846); Handly's Lessee vs. Anthony, 5 Wheat. 378, (1820); Indiana vs. Ky., 136 U. S. 479, (1890); 159 U. S. 275, (1895); 163 U. S. 520, (1897), 167 U. S. 270.

[8]U. S. vs. Chavez, 175 U. S. 509, 522, (1899); Peabody vs. U. S. 175 U. S. 546; Chavez vs. U. S. 175 U. S. 552.

[9]Treaty with Great Britain, 1818, art. 3, Malloy p. 632; 1827, art. 1, p. 644. See also treaty between Great Britain and Venezuela, 1897, adopted as a basis of the boundary arbitration demanded by the United States, Art. 4 affirmed that fifty years prescription gave good title. See Moore's Digest, 1:293.

[10]See Moore's Digest, 1;292: 7;318.

arbitration upon which it was contingent did not become effective, the resolution did not become law. The courts have held that under the constitution congress has no power to declare wars for conquest and the president to wage them for that purpose, hence the United States can not acquire new territory by conquest.[11] Territory under military government or occupation is, therefore, not territory of the United States for purposes of internal administration. This interpretation of constitutional law is, however, no guarantee against the seizure of foreign territory by conquest, for the courts will recognize a forced cession or sale of territory concluded by treaty and they have specifically held that acquisition by conquest is proper by international law, even though prohibited by the law of the United States.[12]

(5) Acquisition of territory by treaty, whether from forced cession, desire of the population, or purchase has been upheld as inherent in the treaty making power of the government,[13] and has been the usual means by which the United States has acquired territory.[14]

The law of the United States thus permits of acquisitions of territory by occupation, accretion, prescription, and treaty, while it requires the government to abstain from acquiring land by conquest. The question is, however, a political rather than a legal question, and so the courts have held.[15] If the political department of government indicates by suitable evidence that it regards new territory as acquired, the courts will follow it. The duty to abstain from acquiring land occupied by other states is, therefore, one left to the discretion of the political department

[11]Flemming vs. Page, 9 How. 603, (1849). Contra see Am. Ins. Co., vs. Canter, 1 Pet. 511, (1828). See Self-Denying Ordinance in reference to Cuba. Apr. 20, 1898. 30 stat. 739 sec. 4.

[12]On thus subject see Flemming vs. Page 9, How. 603, (1849); U. S. vs. Hayward, 2 Gall. 485; U. S. vs. Rice, 4 Wheat. 246; Moore's Digest, 1;290: 7;257-265, 315. Neely vs. Henkel 180 U. S. 109, 119-170 (1900) Moore's Digest 1;535.

[13]See Chief Justice Marshall, in Am. Ins. Co. vs. Canter, 1 Pet. 511, (1828).

[14]Treaties with France 1803, Malloy p. 508, ceding La.; Spain 1819, p. 1651, ceding Fla.; Mexico, 1848, p. 1107, 1853, p. 1121, ceding southwestern territory; Russia, 1867, p. 1521, ceding Alaska, Spain, 1898, p. 1690, ceding Philippines and Porto Rico, Panama, 1903, p. 1351, granting Canal Zone. See also Joint Resolutions of Congress, Mch. 1, 1845, 5 stat. 797; Dec. 29, 1845, 9 stat. 108, admitting Texas to the Union, and July 7, 1898, incorporating Hawaii.

[15]Jones vs. U. S., 137 U. S. 202, (1890); Foster vs. Neilson, 2 Pet. 253.

of the government, and is beyond the power of municipal law to control.

USE OF FORCE AGAINST FOREIGN STATES OR THEIR SUBJECTS

The use of force may be resorted to (1) against a foreign state itself, as in intervention, war or general reprisals; (2) against subjects of a foreign state by way of special reprisals, or (3) against foreigners for breaches of municipal law. The use of force against aliens within the territorial jurisdiction in the usual process of enforcing municipal law may unquestionably be exercised, and gives rise to no duty of abstention. The law of peace, however, requires a government to abstain from using force against foreign states or their subjects outside of its territory.

Such a use of force against the foreign state or within its territory is known as intervention. In treaties with Cuba and Panama the United States has been specifically given the right to intervene.[16]

(1) The Hague convention relating to the pacific settlement of international disputes, which recommends mediation, commissions of inquiry and arbitration in cases of disagreement,[17] as well as numerous individual arbitration treaties,[18] recognizes the duty to abstain from the use of force against foreign states. Another of the Hague conventions[19] requires the United States to abstain from the use of armed force for the collection of contract debts. These treaties have been ratified and are law in the United States, but they are addressed to the political department of the government. The courts in applying the law will recognize sovereign acts of force even when prohibited by treaty. No power of municipal law can compel resort to arbitration or prohibit intervention or a resort to arms, but the definite statement in treaties of an obligation to abstain from the use of armed forces

[16]Treaty with Cuba, 1903, Malloy, p. 362, permits intervention to preserve independence, and with Panama, 1903, art. 23, p. 1356, to protect the canal.

[17]Hague conventions, 1899, i; 1907, i.

[18]There are two kinds of individual arbitration treaties; special, relating to the arbitration of specified claims alone, as the treaty of Washington with Great Britain, of 1871; and general, requiring arbitration of all questions of a certain class. Conventions of the latter class were concluded with a large number of powers in 1908 to last for five years, recourse to the Hague court being provided for.

[19]Hague conventions, 1907, ii.

undoubtedly, in itself, offers a sanction to the observance of this duty by the political authorities of government. The constitutional provision giving congress alone power to declare war appears also to prevent a hasty resort to arms. Experience has, however, demonstrated that the executive can create a situation from which congress can not recede.[20] The use of force in cases not amounting to war, such as naval demonstration, or the employment of armed forces to protect embassies in time of insurrection, has generally been authorized by congress. Such action is not, however, required by law. A number of cases have occurred, notably the Boxer uprising in China, when armed force was used without express authorization, and its use subsequently ratified by congress.[21]

The use of force on foreign territory to suppress marauders and pirates and prevent maltreatment of citizens has been justified on the grounds of self defense. Thus Jackson's invasion of Florida in 1819, and various invasions of Mexican territory in pursuit of marauding Indians; the occupation of Amelia island by United States forces in 1817 to suppress a nest of pirates; the landing of troops in Vera Cruz, Mexico, 1914, and Peking, China, 1899; and the bombardment of Greytown, Nicaragua in 1854 to protect American citizens were justified by the political department of the United States government on this basis. Great Britain in the same manner attempted to justify the seizure in American waters and destruction of the Caroline, in 1837, against the vigorous protest of the United States.[22]

The determination of circumstances warranting intervention in self defense is in any case a political question and forms an exception to the general rule of international law that the state must abstain from the use of force on foreign territory. This general rule of abstention is recognized and enforced by United States law. In the Navy Regulations, the use of force in territorial waters and landing of armed troops, without express permission of the local authorties, is forbidden. Military law also requires strict respect for foreign territory.[23]. Instructions of the

[20]As in the Mexican war.

[21]See Moore's Digest, 7;109-118, Navy regulations, 1913, sec. 1647.

[22]For discussion of these and other cases relating to self defense as a justification for the violation of foreign territory, see Moore's Digest, 2;400-425.

[23]Navy Regulations, 1913, Sec. 1645-1648. Army Regulations, 1913, Sec. 89, ch. 3, Dig. op. judge Ad. Gen. 1912, p. 90. Moore's Digest, 2;364. For similar duties in time of war toward neutrals, see infra. p. 212 et seq.

Department of State further aid in the performance of this duty. In 1887 instructions to a Chargé d'affaire in Peru said, "It is always expected that the agents of the department abroad will exercise extreme caution in summoning war vessels to their aid at critical junctures, especially if there be no practical purpose to be subserved by their presence."[24] The courts have affirmed this view in dicta. Where a seizure under the non-intercourse act was made in foreign territorial waters the court said, "it is certainly an offense against the power which must be adjudicated between the two governments,"[25] and where a naval officer entered foreign territory to recover piratically seized property of American citizens it held[26] that he acted beyond his right, but in both of these cases the foreign government's claim was held to be subject to diplomatic settlement only. Municipal law could offer no relief. Where special permission to pursue marauders on foreign territory or to preserve order is given by treaty, as is the case in several Mexican agreements and treaties with Cuba and Panama, no duty of abstention is involved.[27]

In the present state of the law the enforcement of the duty to abstain from intervention and the use of force on foreign territory belongs primarily to the executive through its control of military and naval forces and diplomatic officers, as well as of the general conduct of foreign relations. Judicial authorities may add their sanction by the enforcement of the usual principles of administrative and military law. Violations of the international obligation, specifically authorized by the political departments of government, are, however, beyond the power of municipal law to control.

(2) Reprisals may be divided into four classes: public and private general reprisals, public and private special reprisals. General reprisal is the right to seize any property of a foreign

[24]Mr. Bayard, Secretary of State, to Mr. Neal, Chargé, Nov. 16, 1887; see Moore's Digest 7;109. See also Consular Regulations, 1896, Sec. 113.

[25]Ship Richmond vs. U. S., 9 Cranch 102, 104, (1815) See also the Itata 1892, Moore, Int. Arb. pp. 3067-3071.

[26]Davisson vs. Sealskins, 2 Paine 324. See also Nelson, Att. Gen., 4 op, 285 (1843); Black, Att. Gen. 9 op. 286, (1859); Moore's Digest, 1;362-365.

[27]Protocols with Mexico, 1882, 1883, 1884, 1885, 1890, 1892, 1896, Malloy pp. 1144-1177. Most of them were to be in force one year, but that of 1896 specified that it should last until Kid's band of Indians be exterminated or pacified. See also treaty with Cuba, 1903, p. 362; Panama, 1903, art. 23, p. 1356; Nicaragua, 1867, art. 15-17, p. 1285.

state or its citizens on the sea, and is equivalent to a state of war, although in the trouble with France in 1798-1799 general reprisals were authorized by congress[28] without an express declaration of war. The courts, however, held that war actually existed.[29] By the abolition of privateering, private general reprisals are no longer permitted. Public general reprisals are still resorted to but are considered in the chapters devoted to obligations in time of war.

By private special reprisals, persons wronged by a foreign state were formerly permitted by commission of their sovereign to indemnify themselves by seizing property belonging to any subject of that state on the high seas in time of peace. This practice would amount to an aggravated form of privateering and would now be regarded as little short of piracy. The legitimacy of the practice seems to be admitted by the constitutional provision giving congress power to grant letters of marque and reprisal, though it was denied by Attorney General Randolph in an opinion in 1793. At present the practice is undoubtedly obsolete.[30] The only question therefore which concerns us here is that of public special reprisals. Under this right the seizure of vessels on the high seas or in the jurisdiction of their own state through such institutions as pacific blockade is generally considered legitimate by writers on international law. As the United States has not resorted to reprisals in time of peace, except in the case of France in 1799 which the courts regarded as war, the courts have had no opportunity to pass upon the legitimacy of seizures by way of reprisal, but they would undoubtedly be bound by any act of the political department of the government in this respect. The power to make war would probably be held to include a power to resort to lesser acts of violence.

(3) The duty to abstain from the use of force outside of the territory of the United States against foreign vessels guilty of infractions of local law, has not been universally maintained by the law of the United States. An act of 1797[31] still in force authorizes revenue officers to board foreign vessels four leagues from the coast; and in Church vs. Hubbart[32] Chief Justice Mar-

[28]May 28, 1798, 1 stat. 361; July 9, 1798, 1 stat. 578; Mch. 3, 1799, 1 stat. 743.

[29]Bas. vs. Tingey, 4 Dall. 37, (1800); Talbot vs. Seaman, 1 Cranch 1, 282, (1801); Moore's Digest, 7;155-153.

[30]Randolph, Att. Gen. 1 op. 30, see Moore's Digest, 7;119.

[31]Act. Mch. 2, 1797, Sec. 27, rev. stat. 2760; Moore's Digest, 1;725.

[32]Church vs. Hubbart, 2 Cranch 187; Scott, 343.

shall upheld the right to make seizures on the high sea for breaches of municipal regulations in a case involving such a seizure by Brazil; but, a few years later, in Rose vs. Himely,[33] changed his mind, and denied the validity of such seizures. The embargo and non-intercourse acts of the early nineteenth century did not permit the seizure of foreign vessels outside of territorial jurisdiction. The rule laid down by Lord Stowell in Le Louis,[34] that visit, search and seizure of foreign vessels beyond territorial jurisdiction is not permitted in time of peace, was followed by Chief Justice Marshall in The Antelope,[35] and appears to be the usual law of the United States. Exceptions to this statement are found in the provisions of treaties authorizing the seizure in restricted zones of slave traders flying foreign flags, and the universally acknowledged right of seizing pirate vessels. These subjects will be discussed in considering the exercise of jurisdiction over the high seas. Cases have affirmed that unequivocal acts of the sovereign authorizing seizures beyond the three mile limit would be obligatory, though such acts should if possible be interpreted to accord with international law.[36] Nevertheless, in the Alaskan seal fishery dispute of 1886 British sealing vessels were seized sixty miles from shore and their seizure justified by courts under a statute which by no means unequivocally authorized such acts.[37] The attitude taken by the courts, however, was that the territorial jurisdiction of the United States extended one hundred Italian miles from the shore; the question will therefore be adverted to in considering the extent of jurisdiction.

While the duty to abstain from the use of force against foreign vessels on the high seas in time of peace is primarily to be controlled by executive authority, yet by the rule requiring legal

[33]Rose vs. Himely, 4 Cranch 241, (1808), see also Hudson vs. Guiestier, 6 Cranch 281, (1810); The Appollon, 9 Wheat. 362, (1824). In the Itata, 1892, Moore's Int. Arb., p. 3067-3071, the U. S. was held liable in damages for a seizure in Chilean waters, see Scott, cases note p. 344. Similar view was held by the U. S. supreme court in the Ship Richmond vs. U. S. 9 Cranch 102, 104 (1815). Moore's Digest, 2;364.

[34]Le Louis, 2 Dods. 210, (1817).

[35]TheAntelope, 10 Wheat. 66, (1825).

[36]Murray vs. The Charming Betsy, 2 Cranch 64, (1804), which held that the non-intercourse act should not be interpreted as authorizing the seizure of foreign vessels on the high seas or prohibiting the sale of national vessels to foreign countries.

[37]See Moore's Digest, 1;895.

adjudication of all seizures courts may add their sanction to the enforcement of this duty.

EXERCISE OF EXTRA-TERRITORIAL JURISDICTION

The final duty of abstention requires a state to refrain from exercising jurisdiction beyond its territory, with a few exceptions. For convenience we may consider the matter under the four heads: (1) extent of territory, (2) jurisdiction over the high seas, (3) jurisdiction over acts committed in foreign countries and (4) jurisdiction over suits against foreign states.

(1) Where the territory of the United States is adjacent to that of foreign states, the boundary has in most cases been defined by treaties which are binding upon the courts in assuming jurisdiction of cases.[38] In the absence of treaty stipulations river boundaries have been held to exist in the middle of the main current.[39] In the case of international rivers, however, a number of treaties have provided that the jurisdiction is subject to the right of free navigation by vessels of all nations,[40] and the courts have maintained this position, holding that a foreign vessel could not be seized for violation of local laws while passing through American waters of an international river, en route to a foreign port.[41] The same freedom of navigation is permitted upon the Great Lakes by treaties with Great Britain.[42]

The extent of territorial jurisdiction on the sea for exclusive fishing privileges was fixed at the three mile limit in the treaty

[38]Cushing Att. Gen. 8 op., 175; U. S. vs. Texas, 162 U. S. 1, (1896).

[39]Handly vs. Anthony, 5 Wheat. 374; Ala. vs. Ga., 25 How. 505; Iowa vs. Ill., 147 U. S. 1, (1893). Moore's Digest, 1;615-621.

[40]See Treaties with Great Britain, 1783, Art. 8, p. 589. Art. 3, Malloy, p. 643; 1846, Art. 2, p. 657; 1854-1866, Art. 4, p. 671, Art. 26, p. 711 decreeing free navigation in the Mississippi, St. Lawrence, St. John, Yukon, Stikine, and Porcupine. With Mexico, 1848, Art. 6, 7, p. 1111; 1853, Art. 4, p. 1123, decreeing free navigation in the Colorado, Gila, and Bravo. In a treaty with Bolivia in 1850, Art. 26, p. 122, it is stated that "in accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata * * opened by nature for the commerce of all nations" and in that with Argentine Republic of 1853, Art. 6, p. 19, the Parana and Uruguay are declared free to commerce even in time of war, with the exception of contraband.

[41]The Appollon, 9 Wheat. 362, (1824).

[42]Treaty with Great Britain, 1871, art. 28, 30, Malloy, p. 711; 1842, art. 2, p. 652; 1854-1866, art. 4, p. 671.

of 1818 with Great Britain.[43] In treaties with Mexico, however, the boundary between the two countries was stated to begin three marine leagues or nine miles from land in the Gulf of Mexico,[44] and an act of 1797[45] still in force authorizes revenue officers to board foreign vessels four leagues from shore. The whole of bays with headlands two leagues apart or even more have been held by statute, official opinions and judicial decisions to be entirely within territorial jurisdiction.[46]

By an act of 1868[47] the killing of fur seal "within the limits of Alaskan Territory or in the waters thereof" was prohibited. Vessels engaged in such business were declared forfeitable and their officers and crew liable to criminal punishment. In 1886 the United States District court of Alaska[48] held a number of seizures of British vessels by revenue cutters, sixty miles from shore, valid under this statute. It reached this decision by applying the meaning of Alaskan territorial waters given in a Russian Ukase of 1821, which it held was the meaning adopted by the political department of the United States government. This Ukase had declared the territorial jurisdiction of Russia to extend one hundred Italian miles from the shore, and the United States claimed to have purchased this jurisdiction with the territory in 1867. The vessels were condemned and the officers held liable to criminal punishment. Upon Great Britain's protest the vessels and men were released and orders sent to Alaska to discontinue pending proceedings. Nevertheless in 1887 and 1889 other vessels were condemned by the same court. The act of 1868 was amended in 1889,[49] the country's jurisdiction being extended "to all the dominions of the United States in Behring Sea". In an arbitration of the question in

[43]Treaty with Great Britain, 1818, art 1, Malloy, p. 631.

[44]Treaty with Mexico, 1848, art. 5, Malloy, p. 1109; 1853, art. 1, p. 1122.

[45]Act. Mch. 2, 1797, sec. 27; rev. stat. 2760, See Moore's Digest, 1;725.

[46]For Delaware Bay, see Randolph, Att. Gen., 1 op. 321, Moore's Digest, 1;735; Chesapeake Bay, Stetson vs. U. S., Moore, Int. Arb., 4; 4337-4341; Moore's Digest, 1: 741; Buzzard's Bay, Public Acts Mass., ch. 1, sec. 12, (1890); Commonwealth vs. Manchester, 152 Mass. 230, (1890), affirmed Manchester vs. Mass., 139 U. S. 240.

[47]Act June 27, 1868, Rev. Stat. 1856.

[48]See U. S. vs. La Ninfa, 49 Fed. Rep. 575, (1891); U. S. vs. the James G. Swan, 20 Fed. Rep. 108; U. S. vs. The Alexander, 60 Fed. Rep. 914.

[49]Act. Mch. 2, 1899, 25 Stat. 1009.

1892 the United States' claim of jurisdiction was denied; thus "the dominions of the United States in Behring Sea" were held in subsequent cases to extend only to the three mile limit.[50]

It is evident that the attitude taken by the United States on the limits of territorial jurisdiction has been by no means uniform. The courts have held that the determination of the matter either as to boundary or jurisdiction over the sea is a political question, and that they are bound to follow the view of the political department of the government.[51] Nevertheless the interpretation of political acts bearing on these points often involves questions of legal definition, and the courts undoubtedly may exercise an effective authority in enforcing the country's duty of abstaining from the exercise of jurisdiction outside of its territory, by refusing to take cognizance of cases, where, according to international law, or national acts interpreted according to international law, the national jurisdiction does not extend. In such cases, therefore, the courts may apply rules of international law directly as rules of decision.

(2) The exercise of jurisdiction over vessels of foreign nations seized on the high seas in time of war, by way of reprisals or when ordered by municipal law, has been considered. The general principle appears to be recognized that in time of peace no jurisdiction may be exercised over vessels of foreign states

[50]On the arbitration see Moore's Digest, 1;913-922. As a result of the arbitration the United States paid Great Britain $473,151.26 as indemnity for the seizures. Judicial discussions subsequent to the arbitration: see The Alexander, 75 Fed. Rep. 519, Pacific Trading Co., vs. U. S., 75 Fed Rep. 519; La Ninfa, 75 Fed. Rep. 513, reversing 49 Fed. Rep. 575; Whitelaw vs. U. S. 75 Fed. Rep. 513. The Behring Sea controversy is discussed at length in Moore's Digest, 1;890-929, and Freeman Snow, Treaties and Topics in American Diplomacy, Boston, 1894, pp. 471-509.

[51]Foster vs. Neilson, 2 Pet. 253; Garcia vs. Lee, 12 Pet, 511; U. S. vs. Reynes, 9 How. 127; Williams vs. Suffolk Ins. Co., 13 Pet. 415; In re Cooper, 143 U. S. 472, 502-505, (1892); Jones vs. U. S. 137 U. S. 202, 212, (1890); U. S. vs. Texas, 143 U. S. 621, 629, (1892). See British case Regina vs. Keyn L. R. 2 Ex. D. 63, (1876) Scott 154, in which criminal jurisdiction on vessels within three mile limit was refused in the absence of specific authorization by the political dept. of govt. Soon after this decision, the Territorial Water Jurisdiction, Act. 1878, 41-2 Vict. c. 73 gave such jurisdiction. In Mortensen vs. Peters, 14 Scot. L. T. R. 227 (1906), Bentwich cases, 12, the court held that it was bound to accept the jurisdiction given it by statute over offenses committed beyond the three mile limit by foreign vessels.

on the high seas. The law of the United States does, however, provide for the assumption of jurisdiction over pirate vessels, slave traders, and national vessels upon the high seas.

(a) Jurisdiction over pirates was given by the crimes act of 1790[52] enacted under the constitutional authority of congress to "define and punish piracies and offences against the law of nations." Besides persons "piratically running away" with vessels or goods worth over fifty dollars on the high seas, the act declared all persons guilty of acts punishable by death if committed in the United States, or of other specified offenses, pirates, and punishable by death. The courts distinguished two classes of offenses in this act: (1) piracy by international law and (2) piracy by national law. It was only for the former offense that the courts could assume jurisdiction of acts committed on foreign vessels.[53] In the latter class of offenses, jurisdiction was only assumed where the offense was committed on a United States vessel or by a United States citizen.[54]

An act of 1819[55] amended this act, so as to make "piracy as defined by the law of nations" punishable by death, and piratical vessels subject to forfeiture. The act was practically repeated in 1820,[56] and appears in the revised statutes as section 5368. It was repeated in the penal code of 1911, the death penalty having been changed to life imprisonment by an act of 1897.[57] The definition of piracy dependent upon the meaning of that term by the law of nations was held sufficiently definite to give criminal jurisdiction.[58]

Persons holding commissions from recognized belligerents, even though not recognized as independent states, can not be considered pirates[59] and, although opinions have differed, the weight of authority holds that the vessels of unrecognized insur-

[52]Act. Apr. 3, 1790, 1 stat. 113.

[53]U. S. vs. Klintock, 5 Wheat. 144, (1820); U. S. vs. Pirates, 5 Wheat. 184.

[54]U. S. vs. Palmer, 3 Wheat. 610, (1818); U. S. vs. Holmes, 5 Wheat. 412, (1820).

[55]Act. Mch. 3, 1819, 3 stat. 513.

[56]May 15, 1820. 3 stat. 600; Rev. Stat. 5368.

[57]Penal Code 1911, sec. 290, Act. Jan. 15, 1897, 29 Stat. 487.

[58]U. S. vs. Smith, 5 Wheat. 153, (1820).

[59]The Nuestra Senora de la Caridad, 4 Wheat. 497; The Santissima Trinidad, 7 Wheat. 283; The Estrella, 4 Wheat. 298; Ford vs. Surget, 97 U. S. 618; U. S. vs. Baker, 5 Blatch, 11,13.

gents may not be treated as pirates.[60] Foreign vessels have been held forfeitable for piratical aggressions though the voyage was not primarily one of piracy,[61] and seizure of innocent vessels on probable suspicion of piracy exempts the captor from liability for damages.[62]

Property seized by pirates has been restored on payment of salvage in the same manner, as in the case of the recapture of prizes during war, though there is no limit to the time during which restoration is possible, as seizure by pirates never divests the original owner of his title.[63] A number of treaties have required such restoration.[64]

Treaties have provided that American citizens accepting commissions against the other contracting party should be treated as pirates. There has been doubt whether such treaty provisions are valid because of the impliedly exclusive power given by the constitution to congress to "define piracies."[65] There have been no criminal prosecutions under such treaties. The act is not one of piracy by international law and therefore could apply only to United States citizens.

(b) Slave trading by United States citizens was made a crime by an act of 1807,[66] and denounced as piracy by a statute of 1820;[67] in this case, however, the crime was not one of piracy by international law. In the early half of the nineteenth century, the United States strenuously opposed Great Britain's claims to visit and search foreign vessels suspected of slave trading, and to punish them as pirates. The practice was continued during the Napoleonic wars,[68] but Lord Stowell by a decision

[60]The Three Friends, 166 U. S. 1, 63, (1897), U. S. vs. the Itata, 56 Fed. Rep. 505; U. S. vs. The Weed, 5 Wall. 62; The Watchful, 6 Wall. 91. Contra see The Ambrose Light, 25 Fed. Rep. 408, (1885), Navy Regulations, 1885, ch. 20, par. 18. See Moore's Digest, 2;1097.

[61]U. S. vs. The Malek Adhel, 2 How. 210.

[62]The Marianna Flora, 11 Wheat. 1; The Palmyra, 12 Wheat. 1.

[63]Wirt, Att. Gen., 1 op. 584, (1822).

[64]See Treaty with Spain, 1795, art. 9, p. 1643; U. S. vs. The Amistad, 15 Pet. 518.

[65]The Bello Corrunes, 6 Wheat. 152; Letter by Sec. of State Marcy, referring to a proposed treaty with Venezuela of this character, Moore's Digest, 2; 978.

[66]Act. Mch. 2, 1807, 2 stat, 420, sec. 7.

[67]Act May 15, 1820, 3 stat. 600, Rev. stat. 5375.

[68]The Amedie, 1 Act. 240, (1810); The Fortuna, 1 Dods. 81, (1811); The Diana, 1 Dods. 95, (1813). The view was held in these cases that foreign vessels seized during war would not be restored if engaged in slave trading.

in 1817[69] refused to recognize these claims as valid in time of peace, and his view was followed by Chief Justice Marshall in 1825;[70] consequently the "pirates" from slave trading were only subject to United States jurisdiction when in domestic vessels.

The treaty of Ghent with Great Britain in 1814[71] expressed the hope that both countries would endeavor to suppress the slave trade, and in the Webster-Ashburton treaty of 1842[72] the United States agreed to maintain a squadron on the West African cost to act in cooperation with a like English squadron, each of them, however, to seize only vessels flying its own flag.

Great Britain definitely renounced her claim to visit and search foreign suspected vessels in 1858, and at the same time the United States senate by a resolution denounced the "visit, molestation, and detention" of United States vessels by force by foreign powers "as a derogation of the sovereignty of the United States."[73] A treaty with Great Britain of 1862[74] provided for the mutual patrol of a conventional zone extending two hundred miles from the African coast, and the seizure of slave traders, to be tried in three mixed courts at Sierre Leone, Cape of Good Hope, and New York. In 1870[75] the mixed courts were abolished by treaty, the same provisions applying to national courts of the two countries. By the general act for the repression of African Slave Trade[76] of 1890, which is a treaty ratified by the United States and sixteen other powers, the visit, search and seizure of vessels of signatory powers under five hundred tons burden, by war vessels of any of the signatory powers, are permitted in a prescribed zone about Africa. Suspected vessels are to be sequestrated and their officers and crew turned over to the country under whose flag they sailed. Slave trading by this convention has been put on a footing resembling that of piracy, though not exactly the same. Visit and search may only be exercised against foreign vessels in the limited zone, and trial is always by the country of the suspected parties.[77]

[69]Le Louis, 2 Dods. 210, (1817).

[70]The Antelope, 10 Wheat. 66, (1825).

[71]Treaty with Great Britain, 1814, art. 10, Malloy, p. 618.

[72]Treaty with Great Britain, 1842, art. 8, Malloy, p. 655.

[73]Moore's Digest, 2;946.

[74]Treaty with Great Britain, 1862, Malloy, p. 674.

[75]Treaty with Great Britain, 1870, Malloy, p. 693.

[76]General Act for the Repression of African Slave Trade, 1890, Malloy, p. 1964.

[77]On the Slave Trade see Moore's Digest, 2;914-951.

(c) Jurisdiction over civil cases involving merchant vessels on the high seas is inherent in the admiralty jurisdiction given to federal courts by the constitution and by the judiciary act of 1789. Cognizance of crimes committed on board national vessels is not, however, inherent in the admiralty jurisdiction,[78] but, by statute, courts of admiralty are given jurisdiction over offenses on United States vessels at sea, even when committed by foreigners.[79] The acts specified as piracy by national law come under this head. The criminal jurisdiction over vessels is not co-extensive with the civil admiralty jurisdiction. The latter has been held to extend over the high seas to tide water mark and in rivers so far as the ebb and flow of the tide, in the United States having been extended over the Great Lakes and all navigable streams.[80] The criminal jurisdiction, however, extends only over United States vessels on the high seas beyond territorial limits. Crimes on board vessels within territorial waters of the United States[81] or foreign countries[82] are not within the statutory grant of jurisdiction to courts of admiralty jurisdiction, but are within the cognizance of the state or foreign country where committed. Statutes have given consular courts jurisdiction over crimes committed by seamen upon United States vessels.[83] The jurisdiction extends where the vessel is in the port of the country where the court is located.[84]

The national jurisdiction over public vessels is complete, and exists even when the vessel is within foreign territorial waters. This jurisdiction is exercised through the courts martial

[78]U. S. vs. Bevans, 3 Wheat. 366; U. S. Wiltberger, 5 Wheat. 76, (1820); U. S. vs. Holmes, 5 Wheat. 412, (1820).

[79]Act. Apr. 30, 1790, 1 stat. 113; Rev. stat. 5346, 5576, Penal Code, 1911, sec. 272. The jurisdiction extends also to offenses committed on Guano Islands. Trial is held in the district court of the district where the offender is found or into which he is first brought, (Rev. stat. 730).

[80]The Genessee Chief, 12 How. 443; The Hine vs. Trevor, 4 Wheat. 555, (1866); The Moses Taylor, 4 Wall. 44, (1866); Packer vs. Bird, 137 U. S. 661, (1891).

[81]U. S. vs. Bevans, 3 Wheat. 336.

[82]U. S. vs. Wiltberger, 5 Wheat. 74, (1820), U. S. vs. McGill, 4 Dall. 426, (1806). U. S. vs. Rodgers, 150 U. S. 249, (1893), seems to be contra. In Reg. vs. Anderson, 11 Cox C. C. 198, (1868), a British case, the court took jurisdiction of a crime by a United States citizen on a British vessel forty-five miles up the Garonne of France. Moore's Digest, 2;937. See infra p. 42.

[83]Rev. Stat. 4084, 4088.

[84]In re Ross, 140 U. S. 453, (1891).

and executive authority. In the case of public vessels not of the navy, the laws giving courts of admiralty jurisdiction of crimes appear to apply as in the case of merchant vessels.

(3) The United States has in general recognized its duty to abstain from the assumption of jurisdiction over acts committed in foreign countries, but certain exceptions to this general rule have been recognized by law. For convenience we may consider the subject under the four heads, (a) acts committed by agencies of government, (b) by citizens, (c) by foreigners, and (d) laws of extraterritorial effect.

(a) The general exemption of foreign public vessels, armed forces, and diplomatic representatives from local jurisdiction is recognized by international law. The law of the United States provides for the exercise of jurisdiction over acts by its agencies of this character even in foreign countries. Naval forces of the United States in foreign jurisdiction continue subject to the articles for the government of the navy, navy regulations and naval instructions.[85] Crimes committed on board such vessels in foreign ports are subject to trial by court martial in the same manner as if the vessel were on the high seas or in a home port. Seamen of the navy are also subject to consular jurisdiction for acts committed abroad.[86]

Armed forces may only enter foreign territory in time of peace by special license,[87] but wherever they are they remain subject to the articles of war, the army regulations, and the general orders of the war department.[88] As with naval forces, crimes committed by members of such forces in foreign territory are subject to court martial trial. Military law is personal, and non-territorial in effect.

The exemption from local jurisdiction of diplomatic representatives is recognized by international law and specified in the instructions to diplomatic officers issued by the president in 1897.[89] By these instructions diplomatic officers are forbidden

[85]See Navy Regulations, 1913; Articles for the government of the Navy, Rev. Stat. 1624.

[86]Consular Regulations, 1896, Sec. 630, p. 268. Moore's Digest, 2; 611. See Navy Regulation Nov. 2, 1875.

[87]See Dig. op. Judge Ad. Gen. 1912, p. 90.

[88]See Articles of War, Rev. Stat. 1342-1343; Dig. op. Judge Ad. Gen. 1912, pp. 511, 1071.

[89]Instructions to Diplomatic Officers of the United States, (1897), Sec. 46, p. 18; Rev. Stat. 4063-4064.

to submit to local criminal or civil jurisdiction, or to testify in foreign courts without the express consent of the United States.[90] They remain subject to the instructions of the department of state and the president, by whom they may be recalled at pleasure,[91] and to the law of the United States.

Consuls do not enjoy the exemptions of diplomatic officers from local jurisdiction except in non-Christian countries. They are, however, declared by the consular regulations of 1896 to be exempt from jury and militia duties, and their archives are not subject to local jurisdiction.[92] Consuls abroad are subject to consular regulations and the authority of the department of state and the president. They may be punished in the United States for crimes committed abroad.[93] The consular regulations declare United States consular officers to be immune from local criminal and civil jurisdiction, and subject to diplomatic privileges in non-Christian countries.[94] In such cases their acts are subject to the jurisdiction of United States courts as in the case of ministers.

(b) Acts committed by United States citizens abroad are not in general subject to the jurisdiction of United States law. This applies to acts committed on national merchant vessels in foreign ports. Thus the United States courts have held that statutes conferring jurisdiction over crimes committed within the admiralty jurisdiction of the United States do not apply to crimes committed on vessels in foreign ports.[95] Crimes take place where they take effect; consequently the court refused jurisdiction in a case where an American citizen fired a shot from an American vessel, killing a man in foreign jurisdiction.[96]

There are, however, exceptions to this rule. Statutes have provided for the punishment of crimes against the sovereignity of the United States, committed by citizens abroad, such as the unauthorized carrying on of diplomatic correspondence with foreign governments.[97] Another exception occurs in the case of countries where consular jurisdiction has been established

[90]Diplomatic Instructions, 1897, Sec. 46, 48, 53, 56.

[91]Diplomatic Instructions, 1897, Sec. 272-280, Rev. Stat. 202.

[92]Consular Regulations, 1896, Sec. 71-75.

[93]Moore's Digest, 2;267.

[94]Consular Regulations, 1896, Sec. 75.

[95]U. S. vs. Wiltberger, 5 Wheat. 74, (1820); U. S. vs. McGill, 4 Dall. 426, (1806); contra, U. S. vs. Rodgers, 150 U. S. 249, (1893).

[96]U. S. vs. Davis, 2 Sumner C. C. 482, (1837).

[97]Act. 1799, Rev. Stat. 5335. See Moore's Digest, 2:264.

by treaty. Such treaties have been concluded with most non-Christian countries, although that with Japan was abrogated in 1894, as have been those of countries which have since become colonies of European states.[98] The treaties usually specify the limits of this jurisdiction, which has been further defined by act of congress.[99] According to this statute such consuls have jurisdiction over crimes committed by United States citizens in that country, or by sailors in United States vessels, even when the man is a foreigner.[100] A similar jurisdiction is given to consuls and commercial agents in places "not inhabited by any civilized people or recognized by any treaty with the United States."[101] Besides this criminal jurisdiction consular courts exercise civil jurisdiction in cases where American citizens are defendants.[102]

(c) The United States has of all countries been the most consistent in its opposition to the doctrine of extraterritorial jurisdiction over foreigners.[103] As has been observed, the jurisdiction over *citizens* for acts committed abroad, a jurisdiction which is permissible by international law and extensively exercised by many countries, has been but sparingly provided for in the law of the United States. In an exhaustive discussion of

[98]Treaties now in force with Borneo, China, Korea, Morocco, Tripoli, Turkey, Persia, Siam, Tonga. Treaties have been concluded but since abrogated or superseded by annexation with Algiers, Muscat, Zanzibar, Japan, Madagascar, Samoa, Tunis.

[99]Act Aug. 11, 1848, 9 Stat. 276, as amended in Rev. Stat. Sec. 4083-4130. Applies to China, Japan, Siam, Egypt, Madagascar, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, Samoa, and other countries with which appropriate treaties may be concluded. Rev. Stat. 4129. Japan, Madagascar, Tunis, Muscat, and Samoa have since been excluded by treaty.

[100]Consular regulations, 1896, Sec. 629. In re Ross, 140 U. S. 453, (1891).

[101]Rev. Stat. Sec. 4088. This was held to permit the assumption of jurisdiction by a special agent sent over for that purpose in a country where no regular consul or commercial agent resided, by Att. Gen. Garland. (18 op. 219, 1885).

[102]In exercising jurisdiction consular courts apply the law of the United States, the common law, the law of equity and admiralty, and "decrees and regulations" which ministers may make to "supply defects and deficiencies" in the other bodies of law mentioned. Rev. Stat. 4986; Cushing Att. Gen., 7 op. 503; Moore's Digest, 2;614-617.

[103]See the Appollon, 9 Wheat. 362; U. S. vs. Davis, 2 Sumner C. C. 482, (1837).

extraterritorial crime,[104] written by John Bassett Moore in connection with the Cutting case, in which Mexico attempted to assert jurisdiction over an American citizen for acts committed against a Mexican citizen in the United States, only one instance is mentioned in which, aside from treaty agreements, jurisdiction is asserted over foreigners for acts in foreign territory. This case occurs in a statute of 1856[105] which authorizes consular officers and secretaries of legation to administer oaths and perform notarial acts, which shall be valid in the United States. The act also provides that persons committing perjury in such oaths shall be liable to criminal punishment as if the act were committed in the United States, and may be indicted in any district where arrested. This statute was justified by Attorney General Williams[106] on the ground that the domicile of the consul or diplomatic agent where the act was committed is to be regarded as a portion of United States territory. Moore thinks a more satisfactory justification can be found in the implied consent given by the foreign government, to submit its citizen to United States law, when he does these acts before an officer recognized by international law and by the foreign state's own law as competent to perform such functions.[107]

To this example may be added that already mentioned of the jurisdiction exercised by consular courts over seamen of foreign nationality serving on American vessels in foreign ports. The consular regulations very specifically extend this jurisdiction, and in the case of In re Ross[108] its exercise was upheld by the United States supreme court in the case of a British subject, serving on an American vessel and found guilty of murder by the consular court for an act done on the vessel while in the harbor of Yokahama. The usual principle of jurisdiction over acts done on national vessels coupled with the extraterritorial jurisdiction over such vessels, granted to consuls by treaty in this case, furnishes sufficient justification for this exercise of jurisdiction over aliens for acts committed abroad.

[104] J. B. Moore, Report on extraterritorial Crime, For. Rel., 1887, p. 770. A large portion of this report is printed in Moore's Digest, 2;243-269.

[105] Act. Aug. 18, 1856; Rev. Stat. 1750.

[106] Williams Att. Gen., 14 op. 285.

[107] Moore's Digest, 2;267.

[108] See Consular regulations, 1896, sec. 629; In re Ross, 140 U. S. 453, (1891).

Not so easily justified is the jurisdiction given by statute over *every person* committing assaults with a dangerous weapon on vessels wholly or partly owned by United States citizens, on the "high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state". Under this statute jurisdiction was upheld of a crime committed on an American vessel in the Detroit River within the territorial limits of Canada, thus limiting the term "particular state" to states of the union.[109]

In general, however, the law of the United States gives adequate recognition to the duty of abstaining from the exercise of jurisdiction over extraterritorial crime by aliens.

(d) United States courts have in general refused to give an extraterritorial effect to laws, even when no limitation was expressed in terms. Thus the supreme court refused to apply the Sherman anti-trust law to prevent a monopoly in Costa Rica. Justice Holmes speaking for the court, said, "All legislation is prima facie territorial, words having universal scope, such as every contract in restraint of trade, * * will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator may subsequently be able to catch."[110]

In 1908 Judge Advocate General Davis expressed an opinion that declarations of war were laws of extraterritorial effect.[111] Consequently the president could call out the militia for service in foreign countries, under the constitutional and statutory authority to call them out "to execute the laws." A statute of 1908[112] based on this opinion recognized such extraterritorial laws, but the validity of this provision was denied in an opinion of the attorney general in 1912.[113]

[109]Rev. Stat. 5346. See U. S. vs. Rodgers, 150 U. S. 249, (1893). In U. S. vs. Wiltberger, 5 Wheat 76, the court refused jurisdiction of a crime by an American citizen in an American vessel in the river Tigress of China. The statute under which indictment was made in this case was, however, sec. 12, of the crimes act of 1790, (see Rev. Stat. 5576) which extended jurisdiction only over the high seas. See also, Thomas vs. Lane, 2 Sumn. 1, U. S. vs. Coombs, 12 Pet. 72; Moore's Digest, 1:937-938.

[110]American Banana Co. vs. United Fruit Co., 213 U. S. 347, (1909).

[111]See Cong. Record, 60th Cong., 1st Sess., 1908, vol. 42, p. 6940, 6661; 63rd Cong., 2nd Sess., p. 7778.

[112]Act May 27, 1908, 35 Stat. 399, Sec. 5 p. 400.

[113]Att. Gen. Wickersham, 29 Op. 322, (1912). But see Act. Feb. 16, 1914, Sec. 4, in which the power to summon the naval militia for service "within or without" the territorial jurisdiction of the United States is given.

Though this view applies to ordinary laws, there are undoubtedly laws of extraterritorial effect. Such, for instance, are the articles of war, the articles for the government of the navy, and official instructions to army, navy, consular and diplomatic officers. These are laws of non-territorial character, applying to particular persons wherever they may happen to be. Such laws, however, have been applied only to citizens of the United States, with the minor exceptions mentioned in the last section, and consequently are not inconsistent with the obligation to abstain from extending laws, or assuming jurisdiction over aliens abroad.

(4) The courts have affirmed on numerous occasions that they can not assume jurisdiction over suits against foreign states, or sovereigns, or their official representatives, such as ministers and ambassadors.[114] The commonwealths of the union have also been considered sovereign in this respect, and no suits against them entertained unless jurisdiction has been specifically granted by the constitution.[115] The government of the United States is itself in this class and can not be sued unless specific provision is found in statute.[116]

The courts have, however, held that a nominal suit to discover facts may be within their jurisdiction.[117] They may also assume jurisdiction of suits brought by sovereigns. As in such suits the sovereign has voluntarily submitted to their jurisdiction, setoffs may be allowed against him to the amount of his claim, but no more.[118] The whole proceeding can never result in an actual judgment against a sovereign.

[114]Underhill vs. Hernandez, 168 U. S. 250; Hassard vs. United States of Mexico, 173 N. Y. 645, 61 N. Y. S. 939; Res Publica vs. De Longchamps, 1 Dall. 111, 116, (Pa.); Hatch vs. Baez, 7 Hun. 596, (N. Y. 1876); Schooner Exchange vs. McFaddon, 7 Cranch 137.

[115]People vs. Dennison, 84 N. Y. 272; Beers vs. Arkansas, 201 How. 527. The immunity of states from jurisdiction in federal courts in cases covered by the constitution was denied in Chisholm vs. Ga., 2 Dall. 419, (1793), as a result of which the immunity was specifically granted from suits by subjects of another state or a foreign state, in the eleventh amendment.

[116]Stanley vs. Schwalby, 162 U. S. 255; Kawananako vs. Polyblank, 205 U. S. 349, 353.

[117]Manning vs. Nicaragua, 14 How. Prac. 517, (N. Y. 1857).

[118]People vs. Dennison, 84 N. Y. 272; King of Spain vs. Oliver, Fed. Cas. 7813; U. S. vs. Eckford, 6 Wall. 490; The Siren 7 Wall. 152. See also Von Hellfeld vs. Russian Govt., a German Case, Am. J. Int. Law, 1911, 5; 490.

In a number of these cases the courts have specifically invoked the principle that courts apply international law, and have found the non-liability of sovereigns to suit among its rules.[119] In other cases, the fact that jurisdiction implies power to enforce, a condition impossible as against sovereigns, was considered sufficient to warrant a refusal of judgment.[120] In cases where the plaintiff sought relief for infractions of right by his own sovereign, the principle that the power which may alter the law can never be bound by it was held to render such a jurisdiction out of the question. Thus in Kawananako vs. Polyblank,[121] Justice Holmes, speaking for the court, said, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

The duties of abstention are in the main of a political nature, and beyond the power of municipal law to control. There have, however, been treaties and statutes defining methods of acquiring territory, the limits of the use of force against foreign countries, and the extent of the national jurisdiction. The courts also, although generally holding such questions political, and following the political department of government in any determination it may give regarding the international duties of abstention, have laid down rules, especially on the question of jurisdiction. As in laying down these principles upon which they and other public officers will act, they find the rules in the law of nations, and apply them according to the principle that courts of the United States apply international law in appropriate cases, judgemade law furnishes an effective municipal sanction to the fulfillment of the state's duties of abstention.

[119]Hatch vs. Baez, 7 Hun. 596, (N. Y. 1876); Res Publica vs. De Longchamps, 1 Dall. 111, 116.

[120]American Banana Co. vs. United Fruit Co., 213 U. S. 347, (1909).

[121]Kawananako vs. Polyblank, 205 U. S. 349, 353.

CHAPTER III. OBLIGATIONS OF ACQUIESCENCE

INTRODUCTORY

As a state is in general bound to abstain from the exercise of sovereignty *outside* of its territory, so in general it may resent any obstructions to the free exercise of its sovereign rights *within* its territory. As has been noted there are exceptions to the general rule of abstention from the exercise of extraterritorial sovereignty. In like manner there are exceptions to the rule of complete internal authority. International law specifies cases in which sovereign rights may not be exercised even within the territory, and thereby imposes a duty to acquiesce in these exemptions. There is, however, great difference of opinion as to what these exemptions are.

It seems that in common law countries the principle of absolute territorial sovereignty is adhered to in theory with great emphasis, but in practice numerous concessions are made.[1] In Roman law countries, on the other hand, many limitations of strict territorial sovereignty are recognized as law, but in practice few more concessions are allowed than under the common law. It is possible that the difference in theory can be traced to the territorial isolation of England in the days when common law originated, as distinguished from the situation of continental European states, where the effect of contiguity and a common descent from the Roman Empire was enhanced by the medieval conception, still lingering in the Roman Law, of a world state, to which all territorial states are subject. However, for our purposes the origin of the difference in theory is unimportant. We do not care whether the exemptions from territorial sovereignty actually practiced were originally justified by a theory of comity or of legal obligation. It remains that many of them are now so habitually observed in practice as to be distinctly obligations of international law. Others are observed with varying frequency, so should be classed as obligations of comity and good will rather than law. A third class of such concessions consists

[1]See Chief Justice Marshall in The Schooner Exchange vs. McFaddon, 7 Cranch 116 (1812).

of obligations sometimes enunciated by theorists but seldom made effective or maintained by practical diplomatists.

In the first class are the complete or partial exemptions from territorial jurisdiction of certain foreign agencies of government, such as executive heads, diplomatic officers, armed forces, public vessels, consuls and sometimes of other foreign subjects, to which may be added the exemptions from complete control of certain portions of territory, such as international rivers and canals, ports and territorial waters of the ocean, and recently acquired territory.

In the second class are exceptions from the usual rule that courts apply the law of the land. Such exemptions occur in cases involving foreign persons, foreign judgments, foreign contracts, etc. Here exists the most marked difference between the Anglo-American and Continental theories. Writers of the latter school usually consider it a duty of the state to assume jurisdiction of cases and apply foreign law according to rules of private international law.[2] Common law writers, on the other hand, generally consider the matter entirely one of comity and policy.[3] They deny that a state is under an international duty to apply foreign law according to any rules other than those its own jurisprudence may direct. Consequently they sometimes object to the term "private international law" but consider the rules governing "conflict of laws" as a branch of the common law. Which theory is best adapted to promote the welfare of men and nations we shall not attempt to decide, but it is certain that no sys-

[2]See H. Bonfils, Manuel de Droit International Public. 3rd. ed., Paris, 1901, p. 3; F. DeMartens, Traité de Droit International, 3 vols., Paris, 1883, 2; 391-400: See also Annuaire de l'institut de Droit International, 1902, 1904, 1906, 1908 and compare attitude of representatives of Continental and Common Law countries in discussions of private international law.

[3]See T. E. Holland, Elements of Jurisprudence, 11th ed., N. Y., 1910, pp. 410-419: J. Westlake, A Treatise on Private International Law, 3rd ed., London, 1890, pp. 1-7: Joseph Story, Commentaries on The Conflict of Laws, 8th ed., Boston, 1883, pp. 8-9, 24; F. Wharton, A Treatise on the Conflict of Laws, 3rd ed., 2 vols., N. Y., 1905, pp. 2-4: A. V. Dicey, A Digest of the Law of England with reference to the Conflict of Law, 2nd ed., London, 1908, pp. 3-16: F. Pollock, First Book of Jurisprudence, 2nd ed., London, 1904, p. 99: T. J. Lawrence, Principles of International Law, 4th ed., N. Y., 1910, pp. 5-6: A. S. Hershey, The Essentials of International Public Law, N. Y., 1912, pp. 4-5, Bibliography, p. 13.

tem for the application of law has been universally consented to at present. Although American courts have occasionally applied rules on the subject because they deemed them established by international law,[4] their general tendency has been to regard precedents of the common law alone. We will therefore exclude the rules of private international law from consideration. At present international law imposes no duty upon states to apply foreign law in certain cases.'

In the third class are duties connected with the control of private persons and commerce. It is sometimes asserted that states are bound to acquiesce in the immigration of foreigners and the emigration of inhabitants; the naturalization of aliens and the expatriation of citizens; and the importation and exportation of goods.[5] If the state were really under an international obligation to acquiesce in these matters, if it had no legal right to say who should enter or leave its territory, who should form its citizenship and what commercial policy should be pursued, the regime of territorial state sovereignty would be at an end. The United States has certainly not acted upon this theory in its entirety. It has passed laws prohibiting immigration not only of various classes but of whole races, and laws expelling aliens after they have arrived. In its diplomatic correspondence, instead of maintaining acquiescence in emigration as a duty under international law, it has considered it a duty of states to prohibit the emigration of certain classes.[6] Even less has unlimited admission to citizenship been permitted by law. Large classes and whole races are permanently excluded from this privilege. Laws permitting naturalization have been framed with reference to national policy, not international duty. By admitting the right to restrict emigration, the right to prevent the loss of its citizens by

[4]See Hilton vs. Guyot, 159 U. S. 113 (1894), in which Justice Gray, speaking for the court, decided that international law, public and private, is part of the law of the United States and requires adherence to the principle of reciprocity in applying foreign judgments. He therefore refused to apply a French judgment, as French courts did not apply foreign judgments, but in Ritchie vs. McMullen, 159 U. S. 235, at the same time, he applied an English judgment on the same principle. Justices Fuller, Harlan, Brewer, and Jackson dissented in Hilton vs Guyot on the ground that the common law was decisive, and it applied the principle of res judicata to foreign as well as domestic judgments.

[5]See Bonfils, op. cit., sec. 412-414; Hershey, op. cit. p. 257, and note, also bibliography, p. 273.

[6]See Moore's Digest, 2;427.

expatriation is admitted. Whether the citizens who have emigrated and reside abroad may expatriate themselves, acquire citizenship in another country and claim the privileges of the new citizenship on returning is a different question. The United States has maintained that the recognition of the right of expatriation is a duty of international law, but all nations have not given assent to this doctrine.[7] The opinion which considers a state bound to acquiesce in the freedom of commerce has certainly received no countenance from American practice. The United States has completely prohibited exportation, by embargo acts. It has prohibited trade with specified countries by non-intercourse acts and has habitually placed serious limitations upon importation by protective tariffs. No duty of acquiescence in these fields is required by international law, and the subject need no longer detain us.

Limiting consideration to the first class, we may discuss the national measures enforcing the duty to acquiesce in limitations upon the complete exercise of authority within the territory, under three heads: (1) privileges of foreign agencies of government and persons, (2) liabilities attached to newly acquired territory, (3) exemptions of certain portions of territory from complete control, or servitudes.

As in the case of the duty of abstention this duty is one directed immediately to the sovereign power of the state. If the sovereign refuses to acquiesce in the immunity of ambassadors, and orders his courts to assume jurisdiction over them, the courts must obey. If by an act of state he refuses to recognize the right of inhabitants of acquired territory to their vested rights under the former sovereign, the courts must obey.[8] Or if he refuses to permit vessels in distress to enter his ports, and commerce to pass upon his boundary rivers, his international canals and his territorial waters, the obligation can not be enforced by municipal law.[9] In all of these cases, however, in the absence of express

[7]The "inherent right of expatriation" was enunciated by congress in 1864, Rev. Stat., 1999-2000.

[8]See West Rand Central Gold Mining Co., vs. Rex., L. R. 2 K. B. 391 (1905), which held that "an act of state" barred recovery from the British government of a claim due from the Transvaal government before acquisition. Discussion of this case by J. Westlake, "Is Int. Law Part of the Law of England?", Law Quar. Rev., 22;14.

[9]The fortifications of the Panama Canal amounts to an announcement that the United States will not acquiesce in its freedom to commerce under all circumstances.

statute the courts may enforce the duty by adhering to the rule that international law is to be applied in appropriate cases, and that statutes are to be interpreted so far as possible in accord with that law. And where the rules of international law are expressly declared by treaty, statute or executive order, the power of municipal law to enforce is clear.

PRIVILEGES OF FOREIGN AGENCIES OF GOVERNMENT AND PERSONS

(1) Foreign public vessels are granted the right of asylum coupled with immunity from local jurisdiction in several treaties,[10] and in a large number of treaties the United States has agreed to accord the most favored nation treatment to the diplomatic representatives of the contracting power,[11] and special privileges have frequently been thus accorded to foreign consuls. These privileges do not in general extend beyond the immunity of the consular archives from seizure, the inviolability of the consulate, and the privilege of adjusting disputes between sailors on national vessels and performing functions connected with commerce. Most treaties specify that the consul shall be subject to local jurisdiction in the same manner as citizens and to most favored nation treatment.[12] By a few treaties consuls are exempt from giving testimony,[13] and in non-Christian countries, where extraterritorial privileges are granted consuls usually enjoy diplomatic immunities by treaty; such privileges, however, are not reciprocal.[14]

The consular regulations and diplomatic instructions outline

[10]See Treaties, France, 1778-1798, art. 17, Malloy p. 474; 1800-1809, art. 24, p. 504; Great Britain, 1794-1807, art 25, p. 604; Prussia, 1785-1796, art. 19, p. 1483; 1799-1810, revived 1828, art. 19, p. 1493; Sweden, 1783-1799, revived 1816, 1827, art. 19, p. 1732; Netherlands, 1782-1795, art. 5, p. 1245.

[11]Such treaties have been concluded with twenty-one countries, mostly in South and Central America. The Spanish treaty of 1902, also, contained this stipulation (art. 12, Malloy, p. 1704).

[12]In 104 treaties with 51 countries provision for consular officers is made. 20 special consular conventions with 15 countries have been concluded. Consular conventions with practically all countries are now in force. Russia, however, since the termination of the treaty of 1832, by joint resolution of congress in 1911, is an exception to this rule.

[13]For example see treaty with France, 1853, art. 2, Malloy, p. 529.

[14]See Moore's Digest, 5, 37-40. Supra, pp. 39-40.

the privileges of such officers. These executive orders are not of importance in enforcing the country's duty of acquiescing in the immunities of foreign resident officers, but they illustrate the view of the law taken by the United States.

In several treaties private citizens of the contracting parties are granted immunity from military service.[16]

(2) Courts have enforced the duty to acquiesce in the immunities granted by treaty and statute as well as others recognized by international law. They have held that jurisdiction may not be assumed of suits against foreign sovereigns,[17] and former officers of foreign governments,[18] for political acts, even when they are within the territory. The same exemption has been held to apply to public vessels[19] and other personal property of a foreign state or sovereign.[20] Public armed troops and soldiers have also generally been held exempt when acting under orders of their sovereign,[21] but in the celebrated case of People vs. McLeod,[22] in which a court of the state of New York refused to recognize such immunities, a reverse attitude was taken. In this case the authorities at Washington favored the release of McLeod in accordance with international duty, but were unable to release him from state authority. The case illustrates the obstacle which the divi-

[15]Consular Regulations, 1896, sec. 71-75, 82. Diplomatic instructions, 1897, sec. 18, 46-49.

[16]Such treaties have been concluded with sixteen countries. Those with Argentina, 1853, art. 10, Malloy, p. 23; Congo, 1891, art. 3, p. 329; Costa Rico, 1851, art. 9, p. 344; Honduras, 1864, art. 9, p. 955; Italy, 1871, art. 3, p. 970; Japan, 1894, art. 1, p. 1029; Paraguay, 1859, art. 11, p. 1367; Servia, 1881, art. 4, p. 1615; Spain, 1902, art. 5, p. 1703, are now in force.

[17]See Dicta by Chief Justice Marshall, in Schooner Exchange vs. McFaddon, 7 Cranch 116 (1812). British case, Mighell vs. Sultan of Johore, L. R., 1894, Q. B. D., 1; 149.

[18]Underhill vs. Hernandez, 168 U. S. 250.

[19]U. S. Peters, 3 Dall. 121; Schooner Exchange vs. McFaddon, 7 Cranch 116, 137 (1812); Tucker vs. Alexandroff, 183 U. S. 424 (1902). See British case, The Parlement Belge, L. R., 5 P. D. 197, 217 (1900), Bentwich, p. 123; Scott, 220.

[20]Hassard vs. U. S. of Mexico, 61 N. Y. S. 939 (1899). British case, Vavasseur vs. Krupp, L. R. 9, Ch. D. 351 (1878); Moore's Digest, 2, 558-593.

[21]Tucker vs. Alexandroff, 183 U. S. 424 (1902); Dicta Schooner Exchange vs. McFaddon, 7 Cranch 116 (1812).

[22]People vs. McLeod, 25 Wend, 253; 26 Wend, 663; See Moore's Digest, 2; 24-25. McLeod was tried and finally acquitted on an alibi.

sion of power between state and national government may offer to the performance of international duties. Soon after this case, by an act of 1842,[23] congress provided for the release of such persons from state courts by habeas corpus issued by federal courts.

The exceptions to the general rule of exemption in cases where it becomes necessary for the state to vindicate a violation of its neutrality are considered under that subject.[24]

(3) By statute courts are forbidden to take jurisdiction of cases against diplomatic ministers and members of their households upon either civil or criminal charges.[25] This has been held to apply to such officers accredited to third countries in transit through the United States[26] as well as those accredited to the United States, but the person claiming immunity must be an actual diplomatic officer. A consul general performing diplomatic functions was held not to be within the immunity.[27] Few cases have come before United States courts involving, directly, jurisdiction over diplomatic officers. Generally a release has been effected by executive authority before the process has gone so far. In a number of cases dealing with the punishment of persons violating diplomatic immunities the question has been discussed.[28] The courts have also held that a diplomatic officer may not be compelled to give testimony.[29]

For the better enforcement of these duties the constitution has conferred jurisdiction over cases involving ambassadors and public ministers upon the federal courts, and has also given the supreme court original jurisdiction in such cases.[30] Statutes[31]

[23]Act Aug. 29, 1842, Rev. Stat. sec. 753; Moore's Digest, 2; 30.

[24]Infra, p. 129 et seq.

[25]Act. Apr. 30, 1790, 1 Stat. 117, Rev. Stat., sec. 4063-4064.

[26]Wilson vs. Blanco, 56 N. Y. Superior Court 582; 4 N. Y. S. 714; Scott, 206.

[27]In re Baiz, 135 U. S. 403 See British case, Heathfield vs. Chilton, 4 Burr. 2015, Scott, 189. On diplomatic immunities generally see Ex Parte Cabrera, 1 Wash. C. C. 232; Cushing Att. Gen., 7 op. 367 (1855); Triquet vs. Bath, 3 Burr. 1478, and other English cases, cited Scott, 191, note.

[28]U. S. vs. Liddle, 2 Wash. C. C. 205 (1808); Res Publica vs. De Longchamps, 1 Dall. 111 (Pa. 1784); U. S. vs. Ortega, 4 Wash. C. C. 531 (1825); U. S. vs. Benner, Baldwin 234.

[29]Guiteau's Trial, 1; 136; Moore's Digest, 4; 645.

[30]Constitution, Art. iii.

[31]Judiciary Act, Sept. 24, 1789, sec. 9, 11, 13, 1 Stat. 76, Rev. Stat. Sec. 687, 711, Judicial Code 1911, 36 Stat. 1087, sec. 256, cl. 8.

have made jurisdiction over such officers or their households exclusive in the federal courts, thus prohibiting the exercise of any such authority by state courts, and preventing an occurrence in reference to public ministers similar to that of the McLeod case, in reference to foreign armed forces. Statutes have also provided that the supreme court "shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or servants as a court of law can have consistently with the law of the nations."[32]

The courts have held that consuls are not entitled to the immunity of ambassadors, but are subject to criminal and civil jurisdiction.[33] Consuls are generally held exempt from military and jury service, but United States citizens holding foreign consular positions may not claim this exemption,[34] and trading consuls are subject to the liabilities of native merchants in all that concerns their business.[35] Treaty privileges of consuls are protected by the constitutional principle that treaties are law to be applied by the courts. In a case in which a consul claimed immunity from subpoena under treaty, the court held that even the constitutional provision giving a person under criminal indictment the right "to have compulsory process for obtaining witnesses in his favor" would not permit of serving process on such a consul.[36]

The constitution confers jurisdiction, in cases affecting consuls, upon federal courts and original jurisdiction in such cases upon the supreme court. By the Judiciary Act of 1789,[37] juris-

[32]Rev. Stat. 687; Judicial Code, 1911, 36 Stat. 1087. sec. 233.

[33]Commonwealth vs. Kosloff, 5 Serg. and Rawle, 545, (Pa. 1816); Coppell vs. Hall, 7 Wall. 542, (1868); Gittings vs. Crawford, Taney's Decisions, 1; In Re Baiz, 135 U. S. 403; Berrien, Att. Gen. 2 op. 378, (1830); Butler Att. Gen., 2 op. 725, (1835); Cushing Att. Gen. 6 op. 18, 367, (1854-1855). In U. S. vs. Ravara, 2 Dall. 297, (1793), a consul was subjected to criminal jurisdiction. British cases, see Barbuit's case, Cas. Temp. Talbot, 231 (1737); Clark vs. Cretico, 1 Taunt. 106, (1808); Viveash vs. Beckers 3 M. & S. 284, (1814).

[34]Cushing Att. Gen., 8 op. 169, (1856).

[35]Coppell vs. Hall, 7 Wall 542, (1868).

[36]In Re Dillon, Fed. Cas. 710; Moore's Digest 5;78. The court held that the constitutional provisions only insure equal privileges in obtaining witnesses to the accused and the government, not an absolute right in either case. The French government maintained that rights of its consul under international law as well as under treaty had been violated by the serving of process which gave rise to this case.

[37]Judiciary Act. 1789, Rev. Stat. sec. 711, Cl. 8.

diction of suits against consuls was given exclusively to federal courts. By an act of 1875 this provision was repealed, giving state courts a concurrent jurisdiction, but in the Judicial code of 1911 the jurisdiction of federal courts was again made exclusive. The supreme court exercises original, but not exclusive, jurisdiction in such cases.[38]

(4) A more extensive limitation upon territorial sovereignty than the mere immunity of consuls in these respects, is the jurisdictional privileges accorded by some treaties. The United States has never concluded treaties by which foreign consuls or diplomatic officers exercise extraterritorial jurisdiction in its territory to the extent that such jurisdiction is commonly exercised in non-Christian countries, but certain privileges have been accorded. These privileges, which have always been reciprocal, generally permit foreign consuls to "sit as judges or arbitrators in such differences as may arise between the captain and crew of the vessels belonging to the nations whose interests are instrusted to their charge, without the interference of the local authorities," and to require the assistance of local authorities "to cause their decision to be carried into effect or supported."[39] These treaties undoubtedly impose a duty upon the United States to acquiesce in the consular jurisdiction provided for. It has been held that the authority is ministerial and not judicial,[40] and in an early opinion the court expressed the view that the treaties were not self-executing, and local officers could not lend assistance without statutory authority.[41] This view is not generally maintained, but to avoid difficulties a statute of 1864[42] required United States courts

[38]Act. 1875, 18 Stat. 318. See Wilcox vs. Luco, 18 Cal. 639, (1898). The court below held that the constitutional provision alone gave exclusive jurisdiction to federal courts, but this was reversed in the state supreme court. See Moore's Digest, 5;72-77, Scott, 205-206, note. Judicial code 1911, 36 Stat. 1087, sec. 256, Cl 8: sec. 233.

[39]See Treaties with Prussia, 1828, art. 10, Malloy, p. 1499; France, 1853, art. 8, p. 531; Italy, 1878-1881, art. 11, p. 980; 1881, art. 1, p. 983; Sweden and Norway, 1827, art. 13, p. 1753; Austria-Hungary, 1870, art. 11. p. 42; Belgium, 1880, art. 11, p. 97; Germany, 1871, art. 13, p. 554. See also Consular Regulations, 1896, and Moore's Digest, 2;298. The treaty with France 1788-1798, art. 12, Malloy, p. 495 gave consular courts jurisdiction "of all differences and suits between subjects" of the respective countries. See Moore's Digest 2;83-85.

[40]Cushing Att. Gen., 8 op. 380, (1857).

[41]See Moore's Digest, 2;298.

[42]Act June 11, 1864, 13 Stat. 12, Judicial code, 1911, 36 Stat. 1087, sec. 271.

and officers to issue process on application of consuls in fulfillment of treaty obligations when that country accorded reciprocal privileges as attested by proclamation of the president. The president has proclaimed this situation with reference to most of the treaties in force.[43] The courts have enforced these provisions by refusing jurisdiction of cases coming within the consular privileges,[44] but it has been held that where disturbances affect the tranquillity of the port, the national courts may always exercise jurisdiction.[45]

(5) An exemption from territorial jurisdiction which if carried to excess might become a source of public danger is that granted to persons within diplomatic residences, consulates or public vessels. This is known as the right of asylum.[46] It should be noted that the immunity of public vessels and diplomatic and consular residences does not necessarily imply a right of giving asylum. Thus a great many treaties declare that consular residences shall be inviolable, but "in no case shall their offices and dwellings be used as places of asylum."[47] Although this distinction may exist in reference to the duty of the foreign privileged authority, it can not with reference to the duty of the state upon whose territory this authority is located. If the state must acquiesce in the immunity from entry of a diplomatic residence or a public vessel, it must also acquiesce in its use as an asylum, so far as immediate assertion of its authority is concerned. It can of course protest and recover the fugitive by diplomatic means.

[43]Proclamations Feb. 10, 1870, May 11, 1872; See Moore's Digest, 2;299.

[44]Tellefsen vs. Fee, 46 N. E. 562, (Mass.); The Elwine Kreplin, 9 Blatch. 438; Williams vs. Wellhaven, 55 Fed. Rep. 80.

[45]This exception to the consular privilege is specified in all of the treaties mentioned, (note 39), except that with France 1853, art. 8, p. 531. See Wildenhus' case, 120 U. S. 1; Com. vs. Luckness, 14 Phila. 363, (Pa.); Taft, Att. Gen., 15, op. 178, (1878).

[46]On the right of asylum see Moore's Digest, 2;755. In early times the privilege of giving asylum was recognized and often abused. Moore says, "In some instances ambassadors of a thrifty turn realized enormous profits by hiring and granting their protection to houses which they then sublet to malefactors". Moore's Digest, 2;759.

[47]See Treaties with Netherlands, 1878; Salvador, 1870; France, 1853; Belgium, 1868; 1880; Italy, 1868; 1878; Roumania, 1881; Servia, 1881; The German treaty of 1871, art. 5, Malloy p. 552, declares that consulates shall be inviolable "except in the case of pursuit of crime." See Moore's Digest, 2;755-757.

In its diplomatic instructions, consular regulations and naval instructions, the United States forbids the granting of asylum except in unusual cases.[48] This is the practice generally required by treaties and may be said to be the law, although in a number of cases American officials have given asylum, especially to political refugees in South American countries.[49]

On the other hand the United States has generally recognized the immunity of diplomatic residences and foreign vessels of war from entry and service of legal process, although in an opinion of 1794[50] Attorney General Bradford held that a writ of habeas corpus could be served on a foreign public vessel, while in 1799[51] Attorney General Lee thought civil or criminal process might be served in a British man of war. In an opinion of 1855[52] Attorney General Cushing emphatically maintained the doctrine of exemption, going even to the extent of extraterritoriality. In several treaties the right of asylum to slaves on public vessels is affirmed,[53] and in the Brussels act of 1890[54] slaves fleeing to war vessels of the signatories are declared to become free. Consulates do not enjoy immunities, by international law, and consequently could under no circumstances give asylum, unless immunity is granted by treaty, as is done in a number of cases.

Acquiescence in the right of asylum, so far as it is necessitated by the immunity of diplomatic residences, consulates and public vessels from territorial jurisdiction, is enforced by the same means;[55] but there is really no duty of acquiescence, for the

[48]See Diplomatic instructions, 1897, sec. 49-51; Consular Regulations, 1896, sec. 80; Navy Regulations, 1913, sec. 1649.

[49]See Moore's Digest, 2;781-883.

[50]Bradford Att. Gen., 1 op. 47, (1794).

[51]Lee Att. Gen., 1 op. 87, 89, (1799).

[52]Cushing Att. Gen., 7 op. 112; 8 op. 73, (1855, 1856).

[53]By the treaty with Algiers of 1795-1815, art. 11, Malloy p. 3, the return of slaves fleeing to public vessels was required; by that of 1816-1830, art. 14, p. 14, Christian captives fleeing to United States public vessels might be granted asylum. By the treaty with Tunis 1797-1824, art. 6, p. 1795, the return of slaves was demanded, but as amended in 1824-1904, art. 6, p. 1801, slaves gaining asylum were free. The treaty with Madagascar, 1881-1896, art. 7, p. 1071, forbade the giving of asylum to slaves.

[54]General act for the Repression of the Slave Trade, Brussel's Convention, 1890, art. 28, Malloy, p. 1975.

[55]See U. S. vs. Jeffers, 4 Cranch C. C. 704, Scott, 256, (1836), in which a constable was removed from office for arresting a fugitive slave in the house of a British Secretary of Legation. See British case, Forbes vs. Cochrane, 2 Barn. & Cress, 448, (K. B. 1824), Scott, 258, where it was

state may, within its international right, protest the matter diplomatically.

Resident subjects of foreign states are permitted no special privileges or exemptions from territorial jurisdiction except those specifically accorded by treaty, such as military exemptions. In these cases the courts by directly enforcing treaty provisions as law may enforce the states' duty of acquiescence.

LIABILITIES ATTACHED TO NEWLY ACQUIRED TERRITORY

The second duty of acquiescence relates to the rights of the inhabitants of newly acquired territory and the liabilities attached to the land. The rules governing these matters are ordinarily spoken of as the law of succession. According to the strict principle of territorial sovereignty, as soon as new territory is acquired, any relations between its inhabitants and the new government would become matters of municipal law. No obligations of international law could exist. The actual law, however, recognizes this case as an exception to the usual rule of complete territorial sovereignty. The land must be taken subject to a kind of servitude. The acquiring state must acquiesce in pre-existing rights of the inhabitants and pre-existing rights of third parties hypothecated upon the territory. These obligations may be classified under three heads: (1) treaties imposing obligations upon the former sovereign, (2) liabilities attached to the territory, (3) rights of the inhabitants derived from the former sovereign.

held that slaves reaching a British warship became free; hence Forbes, the owner of a plantation in Florida, had no action against Cockburn, commander of a public vessel, for affording asylum to and carrying off such fugitive slaves. For extended discussion of rights of asylum on public vessels and limits of local jurisdiction over such vessels in port according to English law, see Report of Royal Commission on Fugitive Slaves, 1876. Great Britain forbade public vessel to give asylum to slaves by an order of 1875, (Br. and For. St. Papers, 66;892). The Royal commission appointed to consider this order held as follows: For right of asylum and extraterritoriality, Phillimore, Bernard, Maine; Contra, Cockburn, Archbald, Thesiger, H. T. Holland, FitzJames Stephen, Rothery, but they held that asylum might be given as a matter of humanity and in any case the local authorities could not recover the fugitives by entry of the vessel. It is interesting to note that the line of cleavage is between publicists on international law and common law lawyers and judges. See in reference to the work of this commission, Maine, Int. Law, p. 88; Stephen, Hist. of the Criminal Law, 2;57; Jour. of Jurisprudence, 20, 1888; Moore, Digest, 2;848.

(1) International law requires the new sovereign to recognize the obligations of treaties concluded by the old sovereign only in case of universal succession. There have been two cases of this character in the history of the United States, those of Texas and Hawaii. Both states had concluded treaties with third parties before annexation.[56] In both cases, in the resolution of annexation the United States declared all treaties of the former states abrogated. Japan offered some protest to the abrogation of her treaty with Hawaii but the United States disavowed any intention of violating vested rights of Japanese subjects under this treaty, and no specific case seems to have arisen.[57]

(2) The second case has arisen in connection with the annexation of Texas and Hawaii and the cessions of Spain following the war of 1898.[58] The United States assumed by statute liabilities hypothecated upon the revenues to a specified amount in the first two cases.[59] In the case of the Spanish cessions the

[56]See Treaties of Texas with France, 1839, Marten's N. R., 16;987: with Great Britain, 1840, Marten's N. R. G., 4;1506: 1841, Ibid. 4;609: with Netherlands, 1840, Ibid. 1;375: See Moore's Digest, 1;456. Texas had also concluded treaties with the United States, see Malloy, pp. 1778-9, which were of course abrogated by annexation. See treaty of Hawaii with Japan, 1886, Br. and For. St. Pap., 77;941.

[57] Joint Resolution, Mch. 1, 1845, 5 Stat. 797; July 7, 1898, Sec. 4, Germany claimed that she retained special rights in the Zulu Archipeligo under protocol with Spain of Mch. 11, 1877, after cession of the Philippines to the United States, a contention denied by the United States. See Moore's Digest 5; 346-352.

[58]The Act of Aug. 8, 1790, sponsored by Hamilton, whereby the national government, as succeeding to much of the sovereignty of the states by the constitution of 1789, assumed their Revolutionary debts to the amount of $21,500,000, may also be cited as a recognition of the duty of the successor to sovereignty. I Stat. 142, Sec. 13.

[59]By the joint resolution of Mch. 1, 1845, 5 stat. 797, consenting to the admission of Texas to the Union, it was specified that Texas should retain public funds, debts, taxes and dues owed the Republic, and vacant lands, to be applied to the payment of debts which were in "no event to become a charge upon the United States." By an act of Sept. 9, 1850, 9 Stat. 446, on consideration of a boundary modification and relinquishment by Texas of "all claims upon the United States for liability of the debts of Texas" the United States agreed to pay $10,000,000 to the state, half of which was to be retained until "the creditors of the state holding bonds and other certificates of the state of Texas for which duties *on imports* were specially pledged shall first file at the Treasury of the United States,

United States refused to include in the treaty of peace a provision presented by the Spanish plenipotentiaries by which the United States was to assume "all charges and obligations of every kind in existence at the time of the ratification of the treaty of peace which the crown of Spain * * may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof."[60] It also rejected a provision requiring that "grants and contracts for public works and services" in Cuba, Porto Rico, and the Philippines be "maintained in force until their expiration, in accordance with the terms thereof, the new government assuming all the rights and obligations thereby attaching up to the present time to the Spanish government." It, however, disavowed, any purpose "to disregard the obligations of international law in respect to such contracts."[61] A number of claims based on Spanish concessions were presented to the government and were variously settled in accordance with opinions of attorneys general and law officers of the War Department, which was then administering the Islands.[62] As an example may be mentioned the case of the Manila Railway Co., a corporation subsidized by the Spanish government which

releases of all claims against the United States." As few of the Texan bonds were specifically pledged upon imports, the act gave rise to question, but was held to require payment of all bonds. (See Cushing Att. Gen. 6 op. 130, (1853), Corwin, Sec. of Treas., Sen. Ex. Doc., 103, (34th Cong. 1st Sess, p. 406-7). In the British claims arbitration of 1853, claims for Texan bonds were presented and the commission held that the United States was not liable, hence these claims were not within the competence of the arbitral court. The matter was concluded by an act of Feb. 28, 1855, 10 stat. 617, by which the United States agreed to pay Texan debts for which the revenues of the state were pledged to the the amount of $7,750,000, to be apportioned pro rata among the creditors. See Moore's Digest, 1;343-347. In the Joint Resolution of July 7, 1898, annexing Hawaii. "the public debt of the Republic of Hawaii" was assumed by the United States to an amount not to exceed $4,000,000. See Moore's Digest, 1;351.

[60]This applied to Cuba and Porto Rico. See Moore's Digest, 1;352. The United States delegation held that these obligations were incurred in a fruitless effort to pacify the Islands extending over a long period of years. The expenditure did not benefit the Islands and should be considered liabilities of the Spanish nation, not of the Islands. See Moore's Digest, 1;351-385.

[61]Moore's Digest, 1;389-390.

[62]Griggs. Att. Gen., 22 op. 310, 408, 514, 520, 546; 23 op. 181; Knox, Att. Gen. 23 op. 451.

claimed a continuance of the periodic subsidies by the new government. The law officer of the Division of Insular affairs of the War Department[63] advised the non-allowance of the claim, holding it to be a personal obligation of the Spanish sovereign, but the attorney general[64] took a contrary view, and in an official opinion held that the United States was liable for this obligation under international law.

To summarize, the United States has generally acknowledged its obligation to pay debts pledged on the revenue, and contracts for the improvement of territory to which it has succeeded. It however, denied such an obligation with reference to the general public debt of the dismembered state, in cases of partial succession.

(3) Certain rights of the inhabitants have generally been specified in treaties ceding territory to the United States. Freedom to leave the country and retain their former allegiance without loss of property, and in case of election to remain in the territory, guarantees of civil rights, religious liberty and sometimes admission to American citizenship have generally been so stipulated.[65] Similar provisions have been contained in resolutions, statutes and executive orders relating to the annexation, government and administration of new territory.[66] By enforcing these provisions the courts have enforced the government's obligations under international law.

The enforcement of constitutional guarantees also acts to protect the rights of inhabitants of such territory, but the courts have drawn distinctions as to the applicability of these guarantees to different kinds of acquisitions. All of the constitutional

[63]Magoon's Reports, 177.

[64]Griggs Att. Gen., 23 op. 181; Knox Att. Gen., 23 op. 1,451. See Moore's Digest, 1;389-410.

[65]Treaties with Great Britain, 1783, art. 4, 5, 6, Malloy, p. 586; 1840, art. 3, p. 656; France, 1803, art. 3, 6, p. 508; Mexico, 1848, art. 8, 9, 11, p. 1111; 1853, art. 2, 5, p. 1121; Russia, 1867, art. 3, p. 1523; Spain, 1819, art. 5, 6, 8, p. 1653; 1898, art. 9,-12, p. 1690.

[66]See Northwest Ordinance, July 13, 1787; Act. Aug. 7, 1789; in reference to Louisiana, Act. Oct. 2, 1803, 2 Stat. 245; Mch. 19, 1804, 2 Stat. 272; in reference to Texas, Joint Resolution, Mch. 1, 1845, 5 Stat. 797; Act Sept. 9, 1850, 9 Stat. 446, Feb. 28, 1855, 10 Stat. 617; In reference to New Mexico, Act. Mch. 3, 1891, 26 Stat. 854; in reference to Hawaii, Joint Resolution, July 7, 1898, Act. Apr. 30, 1900; in refernce to Porto Rico, Act Apr. 12, 1900, May 1, 1900; in reference to Philippines, Act July 1, 1902, Mch. 9, 1902; in reference to Guano Islands, Act 1856, Rev. Stat. 5570-5578.

guarantees apply to incorporated territory such as Alaska,[67] and territory contiguous to the original colonies, but those conferring privileges not "natural rights," but of a technical nature relating peculiarly to the common law, such as trial by jury, or of a political nature such as citizenship, do not apply to inhabitants of unincorporated territory, such as the Philippines, Hawaii, and Porto Rico.[68] None of the constitutional guarantees appear to apply to territory temporarily occupied and under military government,[69] or to consular jurisdiction.[70] It appears, however, that the confiscation of property or the deprivation of life or liberty of persons without "due process of law" in *actually acquired* territory, would be prevented by constitutional guarantees.

The United States courts have held that all public law relating to forms of government, revenue systems, and administration is abrogated by change of sovereignty,[71] but in a number of cases the executive has by order continued the former administrative authorities, in which case their acts are valid.[72] The

[67]Rasmussen vs. U. S., 197 U. S. 510.

[68]For this distinction and reference to "natural rights" see Justice Brown, in Downes vs. Bidwell, 182 U. S. 244, 282. For its application to Hawaii, Hawaii vs. Mankichi, 190 U. S. 197; to the Philippines, Dorr vs. U. S., 195 U. S. 138; and to Porto Rico, Gonzales vs. Williams, 192, U. S. 1.

[69]Neeley vs. Henkel, 180 U. S. 109, 122.

[70]In re Ross, 140 U. S. 453, 464.

[71]Harcourt vs. Gaillard, 12 Wheat. 523; New Orleans vs. U. S., 10 Pet. 602; Davis vs. Concordia, 9 How. 280; U. S. vs. Vaca, 18 How. 556; Am. Ins. Co., vs. Canter, 1 Pet. 542; Pollard vs. Hagan, 3 How. 212-225; U. S. vs. Reynes, 9 How. 127; U. S. vs. D'Auterine, 10 How. 609; Montoult vs. U. S., 12 How. 47; U. S. vs. Yorba, 1 Wall. 412; Stearnes vs. U. S., 6 Wall. 589; U. S. vs. Pico, 23 How. 321; Moore vs. Steinbach, 127 U. S. 70; Alexander vs. Roulet, 13 Wall. 386; Mumford vs. Wardwell, 6 Wall. 423. See Moore's Digest, 1;304-311. For effect of succession on Revenue Laws, see Flemming vs. Page, 9 How. 603; Wirt, Att. Gen., 1 op. 483, (1821); Cross vs. Harrison, 16 How. 164; President's Proclamation, July 25, 1901, and Insular Cases, DeLima vs. Bidwell, 182 U. S. 1; Downes vs. Bidwell, 182 U. S. 244; Dooley vs. U. S. 182 U. S. 222; Armstrong vs. U. S. 182 U. S. 243; Huus vs. N. Y. & Porto Rico, Steamship Co. 182 U. S. 392; Goetz vs. U. S. 182 U. S. 221; Crossman vs. U. S. 182 U. S. 221; Fourteen Diamond Rings, 103 U. S. 176; Dooley vs. U. S. 183 U. S. 151. See Moore's Digest, 1;311-332.

[72]Joint Resolution, July 7, 1898, in reference to Hawaii; War Dept. Circular, Feb. 1899, in reference to territory under military government; act May 1, 1900, in reference to Porto Rico. See Ely's Adm. vs. U. S. 171 U. S. 220, 230, (1898). Moore's Digest, 1;306-308.

system of private law in force has, however, been held to continue until specifically altered by statute. It is upon this principle that the courts of all of the states, originally British colonies or settled from them, have continued to apply the common law,[73] while those of Louisiana and Texas have applied the French and Spanish systems of law respectively. The application of the English law of admiralty in federal courts has been based on a like principle.[74] The courts have applied the same principle to other acquisitions of territory such as Florida, New Mexico, and the Spanish cessions of 1898.[75]

The inviolability of existing contracts and property rights of inhabitants of acquired territory has been generally upheld in reference to obligations owed by the former state itself to such inhabitants. Inhabitants as well as persons of foreign states benefit by the acquiescence of the new sovereign in its duty to assume the public burdens attached to the territory.[76] If a

[73]In Mortimer vs. N. Y. Elevated R. R. Co., 6 N. Y. S. 89, (1889), Scott, 111, a claim that Dutch law rather than English should apply in reference to the portion of New York City originally occupied by the Dutch was denied. The British claim based on Cabot's discovery prior to Dutch occupancy established, in the view of the court, the common law. The court admitted that modern publicists hold that discovery not followed by occupation is insufficient to give title to new territory, but thought that, by the international law of that time, Cabot's claim was valid. As an additional reason for its opinion the court seemed to cast some doubt on the principle that succession does not alter the private law. Thus it held that even if Cabot's claim were not sufficient to establish a prior British title, the Dutch law would have been abrogated by the British conquest and acquisition in 1664. The court, however, suggested that the charter of Charles II, of 1664, specifically established the common law. The intervention of such an act of state would clearly bind municipal courts, even if contrary to international law. It would seem that prescription might have furnished sufficient basis for maintaining the predominance of English law in this case, but it does not seem to have been relied upon.

[74]Thirty Hogshead of Sugar vs. Boyle, 9 Cranch 191, (1815).

[75]Louisiana, see Keene vs. McDonough, 8 Pet. 308; U. S. vs. Turner, 11 How. 663; Florida, see Am. Ins. Co. vs. Canter, 1 Pet. 542; New Mexico, U. S. vs. Power's Heirs, 11 How. 570, U. S. vs. Heirs of Rillieux, 14 How. 189; Leitsendorfer vs. Webb, 20 How. 176. In Chicago Pac. R. R. Co. vs. McGlenn, 114 U. S. 542, the state law was held to apply in territory donated by the state of Kansas to the Federal Government for a penitentiary. See Mortimer vs. N. Y. Elevated R. R. Co. 6 N. Y. S. 89, (1889), Scott, 111, note 73 above. See also U. S. vs. Chaves, 159 U. S. 452, (1895); Strother vs. Lucas, 12 Pet. 410.

[76]Supra, p. 57.

definite act of the political department of government repudiates such liability, there is no recourse for the inhabitants,[77] although foreigners entitled to similar credits can still resort to diplomatic protest.

Where the obligation is one between private parties, treaties generally have required inviolability, and the courts have emphatically maintained that the same doctrine holds in the absence of treaty.[78] Thus Chief Justice Marshall, in upholding a real estate right in Florida based on a grant by Spain, said, "It is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume domain over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change allegiance, their relations to their ancient sovereign are dissolved, but their relations to each other and their right of property remain undisturbed."[79]

[77]West Rand Central Gold Mining Co. vs. Rex. L. R. 2 K. B. 301, 401-2, (1905), and article by J. Westlake, Law Quar. Rev., 22;14-26. In this case it was held that an "act of state" barred the right of an inhabitant of the Boer Republic to recover debts owed him by that republic, from Great Britain, after succession.

[78]Wilcox. vs. Henry, 1 Dall. 69, (Pa., 1782); U. S. vs. Soulard, 4 Pet. 511, (1830); U. S. vs. Percheman, 7 Pet. 51, (1833); U. S. vs. Arredondo, 6 Pet. 691; U. S. vs. Clarke, 8 Pet. 436; U. S. vs. Clarke, 16 Pet. 231; U. S. vs. Repentigny, 5 Wall. 212, (1866); U. S. vs. Hansen, 16 Pet. 196, Delassus vs. U. S. 6 Pet. 117, 133, (1835); Mitchell vs. U. S. 9 Pet. 711, (1835); U. S. vs. Yorba, 1 Wall. 412; Townsend vs. Greeley, 5 Wall. 326; U. S. vs. Anguisola, 1 Wall. 352; Airhart vs. Massieu, 98 U. S. 491; Coffee vs. Grover, 123 U. S. 1, 9, (1887); Ely's Adm. vs. U. S. 171 U. S. 220, 223, (1898); See Moore's Digest 1; 414-427. For citation of further cases see Scott, cases, 97 note. By statute of 1860 congress authorized the courts to settle land claims near the Sault Ste. Marie based on a grant of the King of France in 1750, according to international law, the law of the country from which the claim was derived, principles of justice and stipulations of treaties. Under this act the court held that a grant of land on certain conditions of occupancy was lost upon the grantee's failure to fulfill these conditions after leaving the country because of Great Britain's succession in 1760. The opinion of both the original grantee and his son that the claim was lost, and the failure to advance a claim until seventyfive years after the grant, confirmed the court's opinion that the claim was without merit. See U. S. vs. Repentigny, 3 Wall. 211, (1866), Scott. 98.

[79]U. S. vs. Percheman, 7 Pet. 51, 86, (1833).

This same principle has been applied in cases of succession to insurrectionary and military governments. Private rights and obligations, valid under the law of the previous defacto government, have been enforced.[80] Neither public nor private obligations will, however, be held as valid if they were contracted in support of armed resistance to the United States, or in rebellion. Thus the courts have held that all acts of the Confederate government of 1861 to 1865 were void. No rights could be derived from its laws because its very existence was rebellion against the United States. Acts of the states in rebellion, however, might be valid if not in direct aid of the insurrection.[81] Acts of the Confederate congress accepted by them and enforced by their law, such for instance as acts requiring the acceptance of Confederate paper currency, were valid. Thus the United States courts, after the war, enforced contracts for the payment of Confederate paper for an equivalent value at the time the contract was made, in United States money.[82]

To summarize, the United States has generally by treaty obligated itself to permit the inhabitants of acquired territory to retain their old allegiance if they wish. Treaties, statutes and constitutional guarantees have insured them the usual immunities of citizens. Treaty guarantees and the doctrine that courts apply international law have insured the retention of the existing system of private law until changed by express act of the legislature, and the inviolability of private property rights unless they were directly involved in the promotion of hostilities or rebellion. Statutes and executive orders have occasionally retained portions of the previous system of public law and administration, but the courts have affirmed that public law is abrogated by succession unless express act of the sovereign intervenes.

[80]Succession to British Military Govt. of Castine, Me., 1814, U. S. vs. Rice, 4 Wheat. 246, (1819); to confederate De Facto Govt. of Southern states, 1861-1865, Thorington vs. Smith, 8 Wall. 1, 9-11, (1868); The Venice, 2 Wall. 258; Hanauer vs. Woodruff, 15 Wall. 448; Bissell vs. Heyward, 96 U. S. 580; Delmar vs. Insurance Co., 14 Wall. 661; Horn vs. Lockhart, 17 Wall. 570, 580; Baldy vs. Hunter, 171 U. S. 388, 392, (1890); Sprott vs. U. S., 20 Wall. 459, (1874). See Moore's Digest, 1;45-80.

[81]On the distinction between acts of the Confederate government and of the state in rebellion, see Sprott vs. U. S. 20 Wall. 459, (1874); Williams vs. Bruffy, 96 U. S. 176, 191-2, (1877); Dewing vs. Perdicaries, 96 U. S. 193, (1877); Ford vs. Surget, 97 U. S. 594, 604, (1878). See Moore's Digest, 1;54-60.

[82]Thorington vs. Smith, 8 Wall. 1, (1868).

SERVITUDES.

There have been at different times claims that certain portions of territory are subject to servitudes or rights of use by foreign powers and persons, which are beyond the authority of the territorial sovereign to abridge. Thus it has been said that international rivers and canals are owned by adjacent states subject to the rights of free commerce for all; that marginal seas and straits are free to the innocent passage of foreign vessels, that the territorial sovereign's control of ports is subject to the right of asylum for vessels in case of imminent danger from stress of weather or other cause; that certain portions of territory are subject to the right of innocent passage of foreign troops, and even that all foreign territory, especially frontiers, is held by the territorial sovereign subject to the right of foreign states to enter the same for the purpose of enforcing order when self defense demands.[83] The United States for a long time maintained that British territorial waters about Newfoundland were subject to prescriptive fishing rights of United States fishermen.

If there are any such inalienable servitudes they clearly put the territorial sovereign under a duty of acquiescence. By the award of the Hague arbitration of 1910 between Great Britain and the United States it was held that servitudes were contrary to the doctrine of sovereignty maintained by international law, and could be recognized "only on the express evidence of international contract;" hence the American claim that prescriptive fishing rights on Newfoundland territorial waters constituted a legal servitude in which Great Britain must acquiesce, was of no avail.[84]

(1) It seems that possibly an exception to this broad statement should be made in the case of boundary rivers. In that case the right of free commerce could scarcely be unilaterally restricted, and is universally recognized. United States courts have recognized the principle by holding that vessels traversing American waters of international rivers cannot be seized for

[83]Pleas of self defense were used to justify violations of Spanish and Mexican territory in pursueing Indian marauders, and the landing of troops in foreign ports to protect United States citizens as in the recent (1914) case of Vera Cruz. See Moore's Digest, 2;400-425. On servitudes generally see Hall, Int. Law, 4th ed., p. 106; Moore's Digest, 2;18.

[84]See text of this decision, Am. Jour. Int. Law, 4;948, 958, (1910), Editorial Comment, Ibid. 8;859, (1914); also article C. P. Anderson, The Final Outcome of the Fisheries Arbitration, Ibid. 7;1, 9, (1913).

violation of municipal statutes when bound for a foreign port.[85]

(2) The right of asylum for vessels in distress has also been affirmed in United States law.[86] The courts have refused to condemn vessels forced by stress of weather into ports closed by statute or blockaded by right of war.[87] The right of asylum, however, is subject to the provision that the vessel, unless a public one, shall be subject to the local jurisdiction. It can therefore scarcely be said that the privilege constitutes a servitude upon the port waters.

Most of these so-called servitudes are not maintainable by modern international law. The United States has diplomatically and judicially affirmed its absolute right to sovereignty over its entire territory.[88]

(3) Servitudes conceded by treaty are, however, clearly recognized and certainly impose a duty of acquiescence upon the country. The United States has specifically accorded by treaty the right to certain countries of free commerce in international rivers[89] and in the Panama canal,[90] the right of asylum in ports to either private or public vessels in case of "stress of weather or pursuit of pirates or enemies,"[91] the right of using troops

[85]The Appollon, 9 Wheat. 362, (1824).

[86]Cushing, Att. Gen. 7 op. 122, (1855); The Santissima Trinidad, 7 Wheat. 283; Moore's Digest, 7;982-985. Great Britain treated Jefferson's proclamation, prohibiting hospitality to British warships in 1807, after the Leopard and Chesapeake affair, as a breach of international law. See Moore's Digest, 6;1035.

[87]The Nuestra Senora de Regla, 17 Wall. 30; Moore's Digest, 2;339 et seq.

[88]Schooner Exchange vs. McFaddon, 7 Cranch 116-136, (1812). See Moore's Digest, 2;4-16.

[89]Treaties with Great Britain, 1783, art. 8, Malloy, p. 589; 1842, art. 3, p. 643; 1846, art. 2, p. 657; 1854-1866, art. 4, p. 671; 1871, art. 26, p. 711, decreeing free navigation in the Mississippi, St. Lawrence, St. John, Yukon, Stikine, and Porcupine. With Mexico, 1848, art. 4, 7, p. 1111; 1853, art. 4, p. 1123, decreeing free navigation in the Colorado, Gila, and Bravo.

[90]Treaty with Great Britain, 1901, art. 3, Malloy, p. 783.

[91]The United States has concluded thirty-one treaties with twenty-five countries in which this privilege is specified. Only two appear to be in force, Bolivia, 1858, art. 9, Malloy, p. 117; Prussia, 1799-1810, revived 1828, art. 18, p. 1492. The privilege of free entry to ports is now so universally acknowledged that treaty stipulations are not necessary.

on its territory in pursuit of marauding Indians[92] and the right to establish submarine cable terminals.[93] The usual principle that treaties are enforceable law tends to enforce these duties, but acts of congress may always override such treaty privileges so far as municipal law and the controlling power of municipal courts are concerned.[94]

[92]Protocols with Mexico, 1882 to 1896; by which Mexico was permitted to pursue marauding Indians in United States territory. Malloy, p. 1144-1177.

[93]Special permits with rules have generally been issued by the president to companies desiring to land cables. On the power of the president to give such permits see Richards, Acting Att. Gen., 22 op. 13, (1897); Griggs, Att. Gen., 22 op. 408, (1899). See Moore's Digest, 2;452-466.

[94]For a recent discussion of treaty servitudes or international contracts, see Aix-la-Chappelle Maestricht R. R. Co. vs. Thewis, Dutch Govt. intervener, Apr. 21, 1914, a German case, reported Am. Jour. Int. Law., 1914, 8;858, 907. In this case a portion of Prussian territory was held to be subject to a servitude by which a Dutch Railway Company had the right to operate under Dutch law. Germany claimed that a protocol of Mch. 11, 1877, with Spain created a servitude for her benefit upon the Zulu Archipelago, which remained after cession of the Archipelago to the United States. The United States refused to recognize this claim. See Moore's Digest, 5;351.

CHAPTER IV. OBLIGATIONS OF PREVENTION.

INTRODUCTORY

The municipal laws designed to insure the abstention of the government from illegal acts outside of its territory, and its acquiescence in recognized exemptions from its complete control of its own territory have been considered. But its duties under international law do not stop here. The government is responsible for the acts of its officers and its civil population. It is therefore under an obligation to take positive measures to prevent contraventions of international law by such persons.

The duties of prevention bear a relation to duties of abstention and acquiescence. The responsibility of the government for its subjects extends no further than its own duties. It need prevent nothing which it is not itself bound to abstain from authorizing. In fact it does not extend so far. There are many acts of its subjects which the government is not responsible for and which it need not prevent, but which it must itself abstain from. This is especially evident in the law of neutrality. A neutral government need not prevent the export of arms by its subjects to belligerents, but it must itself abstain from such commerce. In the law of peace the same principle applies. The government must abstain from authorizing the use of force outside of its territory or intervening in the affairs of foreign governments, but it is not responsible, if its subjects do such acts abroad, without authorization.[1] For acts within its territory the responsibility is much greater and hence also is the duty of prevention. For acts of public officers either in its territory or abroad the responsibility of the government is much greater than in the case of private persons, and hence the duty of prevention is more arduous. We may therefore conveniently consider the subject in reference, (1) to agencies of government, and (2) to the civil population. Although the international duties imposed by

[1]See Moore's Digest, 6;787. The United States does recognize a certain responsibility for acts of its citizens in promoting insurrection against states in which it has consular jurisdiction, even when committed abroad. The immunity of United States citizens from local jurisdiction in such cases is accountable for this exception to the general rule. See Rev. Stat. sec. 4090, 4102. Infra p. 74.

treaties are considered in connection with corresponding duties of international law, the general duty of (3) preventing infractions of treaty provisions may conveniently be considered here.

ACTS BY AGENCIES OF GOVERNMENT.

(1) The agencies of government which come in contact with foreign nations in time of peace are the navy, the diplomatic service and the consular service. International law requires that naval vessels obey local regulations on entering foreign jurisdiction, abstain from prohibited acts, and exchange salutes on meeting foreign public vessels. Special duties, when enjoying the hospitality of ports, such as refusing asylum to criminals, slaves and political refugees, are sometimes required by treaty. These duties are specified in the permanent navy regulations and naval instructions[2] issued under authority of the president, and are enforced by the executive control exercised over the navy at all times by the president as commander-in-chief, through the navy department, and the authority of courts martial in enforcing the statutory articles for the government of the navy.[3]

A case involving the enforcement of navy regulations arose in 1893. During the naval revolt in Brazil, Commodore Stanton, an American naval commander, on entering the port of Rio Janeiro, exchanged visits and fired salutes in honor of the naval insurgents. The Brazilian government protested and the navy department on investigation found that Commodore Stanton had violated article 115 of the Navy Regulations of 1893, providing that "no salute shall be fired in honor of any nation * * not formally recognized by the government of the United States." As the offense was due to mistake rather than intent the department, although holding that Commodore Stanton had committed "a grave error of judgment," restored him to his command.[4]

Armed forces are forbidden passing into foreign territory without license, and on such occasions continue subject to military commissions, and army officers are required to observe certain formalities in dealing with representatives of foreign governments.[5]

[2]Navy Regulations, 1913 sec. 1502, 1633-1634, 1641-1651 under authority of Rev. Stat. sec. 1547.

[3]Rev. Stat. sec. 1624.

[4]See Moore's Digest, 1;240-241.

[5]Dig. op. Judge. Ad. Gen. 1912, C. R. Howland ed. pp. 90, 106. Army Regulations, 1913, sec. 398; 407; 889, ch. 3.

(2) Diplomatic officers are likewise subjected to duties while in foreign countries. International law requires diplomatic officers to observe diplomatic etiquette, in making visits, being admitted to audiences and in matters of precedence. It requires abstention from public addresses or expressions of opinion likely to be offensive to the state to which the minister is accredited, and it seems that modern international law requires the minister to prevent his residence being used as a place of asylum by fugitives from justice. This duty is also specified in a number of treaties. In exchange for his immunity from local jurisdiction the diplomatic officer is also required to be especially strict in his observance of local laws. These duties are specified with considerable definiteness in the Instructions to Diplomatic Officers[6] issued by the president under authority of statute,[7] and a number of them are specified in the statutes themselves. Thus statutes specifically forbid ministers to correspond or give information relating to the affairs of the foreign government to which they are accredited to any but the proper United States officials,[8] and specify a number of matters relating to costume, absention from post, correspondence,[9] etc.

The permanent instructions and statutes as well as special instructions issued by the president or secretary of state[10] are enforced by executive control of the ministers' tenure of office, requirements of bonds on acceptance of mission, and criminal liability for misconduct in office.

By the constitution the president with the advice and consent of the senate has the power of appointing diplomatic officers,[11] although special agents have been appointed by the president alone.[12] By statute such appointments (or rather salaries for appointees) are limited to citizens of the United States,[13] and provision has been made to prevent the performance of diplomatic functions by unofficial representatives by making such acts criminal.[14]

[6]Instructions to Diplomatic Officers, 1897, sec. 1-136.

[7]Rev. Stat. sec. 1752.

[8]Act Aug. 18, 1850. Rev. Stat. 1751.

[9]Rev. Stat. sec. 1674-1688.

[10]See Moore's Digest, 5;565.

[11]Constitution, Art. 2 sec. 2, Cl. 2.

[12]See Moore's Digest, 4;412.

[13]Rev. Stat. 1744; Moore's Digest, 4:457.

[14]Act Jan. 30, 1799; Rev. Stat. 5335. This act resulted from the efforts of Dr. Geo. Logan, who attempted on his own responsibility a

Ministers are required by statute to give bond for the faithful performance of their duties, and it has been held that the appointment is not complete until the execution of this bond.[15] Diplomatic officers are subject to special orders of the president generally transmitted through the department of state, and the president may recall such officers at discretion. By statute diplomatic officers have been made responsible for negligence and misconduct in office.[16] Criminal prosecution in United States courts for violation of statutory duties would therefore seem possible.

(3) International law imposes duties upon consuls while in service in foreign territory. They may not enter upon their functions until they have received an exequatur from the government to which they are assigned, and they are bound by its terms. They must observe the local law,[17] although by treaty they are generally exempted from military and jury service, etc. Consulates are frequently declared immune from local jurisdiction by treaty, but it is also a rule of most of these treaties that the consul must refuse to give asylum to persons sought by local authorities.[18]

These duties of consuls are specified in detail in the Consular regulations issued by the president under authority of statute,[19] and a number of them are specified in the statutes themselves.[20] These regulations and statutes are enforced through the executive control exercised over consuls by the president through the department of state, by requirements of bonds and by amenability to criminal prosecutions in the United States for acts done abroad.

Consuls are appointed by the president with the advice and consent of the senate,[21] and it appears that inferior consular

mission of conciliation in France in 1798. It is known as the "Logan Act." There have been no prosecutions under it. See Moore's Digest, 4;448-450. Reference is made to the act in U. S. vs. Craig, 28 Fed. Rep. 795, 801; American Banana Co., vs. United Fruit Co., 213 U. S. 347, 356.

[15]Williams vs. U. S. 23 Ct. Cl. 46; Moore's Digest, 4;457. On liability of bondsman, see U. S. vs. Bee, 4 C. C. A. 219.

[16]Act. June 27, 1860, Rev. Stat. 4110; See also Rev. Stat. sec. 1734; act Dec. 21, 1898, 30 Stat. 771.

[17]See Moore's Digest, 5;698.

[18]Supra, p. 54.

[19]See Consular Regulations, 1896. Duties under International law, sec. 71-76; under treaties, 77-93; under authority of Rev. Stat. sec. 1752.

[20]Rev. Stat. sec. 1751-1752; 1716-1737; Act June 30, 1902, 32 Stat. 547.

[21]Constitution, art. 2, sec. 2; Cl. 2.

officers may be appointed by the president alone or even by diplomatic or superior consular officers.[22] According to a statute of 1906,[23] only American citizens may be appointed to positions with a salary of $1,000 a year or more. A limited application of the civil service principle in making appointments has been put into operation by executive order.[24] Consuls are subject to special instructions of the department of state and the president, and may be removed at the president's discretion.

Consuls are required by statute to give bond for the faithful performance of their duties and they are subject to criminal prosecution in the United States courts for specified acts committed abroad such as accepting appointments as administrator without giving bond or account of money, exacting excessive fees, making false oath, neglecting duty toward seamen, making false certification of property,[25] etc., as well as for general misconduct in office.[26]

The international duties of these governmental agents are enforced largely through methods of executive control. The executive orders and instructions prescribing the conduct of such officers are specifically authorized by statute and are to be regarded as law[27] which may be effectively enforced through the appointment and removal power of the executive. The requirements of bonds, the amenability of naval officers to courts martial, and of consular and diplomatic officials to the criminal jurisdiction of American courts for specified statutory offenses, add further sanction to the enforcement of these duties.

ACTS BY THE CIVIL POPULATION.

Governments are not generally responsible for acts by private citizens committed abroad or on the high seas.[28] Private

[22]Act. Apr. 5, 1906, sec. 2, 3; Consular Regulations, 1888, sec. 8, 7; 1896; sec. 21. See U. S. vs. Eaton, 169 U. S. 331. Moore's Digest, 5; 8-9.

[23]Act Apr. 5, 1906, sec. 5; Moore's Digest, 5;12.

[24]Ex. Ord. June 27, 1906; Dec. 12, 1906; Apr. 20, 1907; Dec. 23, 1910. under authority Rev. Stat. sec. 1753, Act Apr. 5, 1906, and May 11, 1908. See Information Regarding Appointments and Promotions in the Consular Service of the United States, Govt. Printing Office.

[25]Rev. Stat. sec. 1716, 1728, 1734-1737; act Dec. 21, 1898, 30 stat. 771; act June 30, 1902, 32 stat. 547.

[26]Act June 22, 1860, rev. stat. sec. 4110; Moore's Digest, 2;267, note.

[27]See Rev. Stat. sec. 1752. On legal status of executive orders and regulations, see J. A. Fairlie, The National Administration of the United States of America, N. Y. 1905, p. 27.

[28]See Moore's Digest, 6;787.

individuals in such cases are amenable to the jurisdiction of the courts of the foreign government, or if they commit piracy on the high seas to those of any government catching them. They may be punished, but their government can not be held responsible for their acts, and no reparation may be demanded. This principle does not apply in countries where citizens are exempt from local jurisdiction by treaty, and consequently in such places the responsibility of the government of nationality continues, to a limited extent.

There has been some difference of opinion as to whether a state is responsible for the acts of private citizens even within its territory, but the doctrine of responsibility appears to be established.[29] A state is supposed to maintain order and protect life and property within its territory. It therefore is liable to make reparation for failure to do so if such failure results in an injury to a foreign state or its citizens.

This principle is subject to exceptions. Where insurrections are of considerable magnitude or where the country is invaded by hostile forces, incidental injury to aliens is beyond the power of the government to prevent, and the government is therefore not responsible. The general principle, however, is as stated, and clearly implies a duty on the part of the state to prevent acts injurious to foreign states or persons being committed by its civil population.

The subject may be considered under the three heads, (1) injury to foreign states, (2) injury to resident foreign public officers, (3) injury to alien private persons.

(1) International law requires a government to prevent persons within its jurisdiction doing acts directly injurious to foreign states. The supreme court of the United States has held[30] that the measure of this duty is "due diligence" and that as foreign relations are exclusively in the hands of the national government, legislation punishing acts directed against foreign governments is warranted under the constitutional authority to "define and punish * * offenses against the law of nations."[31] By treaty the United States has recognized its obligation to prevent injury to adjacent states by hostile bands of

[29]See article by Julius Goebel, Jr., The International Responsibility of states for injuries sustained by aliens on account of mob violence, insurrection and civil war. Am. Jour. of Int. Law. 8;802, Nov. 1914.

[30]U. S. vs. Arjona, 120 U. S. 479, (1887), Moore's Digest, 1;61.

[31]Constitution, art. 1, sec. 8, cl. 10.

Indians, and forcible measures have been taken to suppress such marauding bands.[32] The manufacture or uttering of counterfeit foreign money or bank notes is made a crime by national statutes,[33] and the courts have declared that such acts are prohibited by international law.[34] Transporting dynamite and other explosives from the United States in vessels bound to foreign countries except in the manner provided by statute is also made a crime.[35]

The duty to protect foreign governments against dangerous characters entering under false passports is recognized by making the issuance of passports by unauthorized persons a crime.[36] The duty of assisting the administration of justice in foreign countries and preventing frauds upon it by persons in the United States is recognized through provisions requiring certain United States officials to respond to letters rogatory from foreign governments requesting testimony in cases in which that government is interested, by issuing process to obtain such testimony from residents. The failure to respond to such summons, on the part of residents of the country, is made a penal offense.[37]

[32]Treaties with Spain, 1795-1902, art. 5, Malloy, p. 1642; Mexico, 1831-1853, art. 33, p. 1095; 1848-1853, art. 11, p. 1112. The government of Mexico protested that the United States was not fulfilling these treaty obligations, but at a mixed commission arbitration under treaty of 1868, Malloy, p. 1128, the Mexican claim was not allowed. See Moore, Int. Arb. 3;2430; Moore's Digest, 2;434. By treaty of 1853, art. 2, p. 1122, the United States was released from this obligation to Mexico. But in protocols from 1882 to 1896, reciprocal permission was given to pursue marauding Indians across the boundaries of the two countries. Correspondence has taken place in reference to the suppression of Indians on the Canadian frontier, but no treaty was negotiated. See Moore's Digest, 2;434-442.

[33]Act, May 16, 1882, 23 Stat. 22; Penal Code of 1910, Act, Mch. 21, 1909, 35 Stat. 1088, in force Jan. 1, 1910, sec. 156-162. Printed with annotations, G. B. Tucker and C. W. Blood, The Federal Penal Code of 1910.

[34]U. S. vs. Arjona, 120 U. S. 479. Moore's Digest, 1;61;2, 450. A similar view was taken in an English case, Emperor of Austria vs. Day and Kossuth, 2 Giff. 628, (1861), in which an injunction was issued to restrain counterfeiting of Hungarian securities on the ground that the law of nations, which is part of the law of England, requires one nation to protect the prerogative privilege of a foreign sovereign to issue money.

[35]Rev. Stat. sec. 4278, 5353; Act, May 30, 1908, 35 Stat. 554, Penal Code of 1910, sec. 232; Moore's Digest, 2;431.

[36]Rev. Stat. 4078, Act of June 14, 1902, 30 Stat. 386.

[37]Rev. Stat. 4071-4083, 771-875; Moore's Digest, 2;104-113.

A further recognition of this duty is found in the statute giving consular courts jurisdiction of acts by American citizens promoting insurrection against the state in which they are located. Such offenses may be punished by death provided the consul and his associates agree and the United States minister gives his approval.[38] The American minister is also authorized to use the military or naval forces of the United States to prevent American citizens participating in such insurrections.[39] This extension of the duty to prevent injury to foreigu states by private persons—to acts committed in foreign countries—is one exception to the rule. The exemption of United States citizens from local jurisdiction in countries granting extraterritorial consular jurisdiction, however, imposes the duty of prevention upon the United States in such cases. American citizens continue under the jurisdiction of the United States even though resident abroad, so it continues to be responsible for their acts.

With the doctrine that the federal courts have no common law criminal jurisdiction, acts injurious to foreign governments can not be prevented through the imposition of criminal penalties by federal courts, except in cases covered by statutes. Although congress has the power to cover completely the field of such penal legislation through its power to punish offenses against the law of nations, the offenses actually covered are comparatively few. The president undoubtedly has power to take preventive measures in matters covered by treaty, and as to duties required by international law in his general control of foreign relations, but a large part of the duty of prevention in this respect remains with the state governments. State courts may assume a jurisdiction over any act injurious to foreign governments according to the common law, and through their general police power the state governments may prevent attempts or plots with such aims in view.[40]

Controversy has arisen respecting the injury of water power locations in one country by depletion or diversion of the river in an adjacent country. It has been held that such acts are cognizable in state courts when proceedings are instituted by citizens of another state of the union, and probably a similar rule would apply in reference to like injuries to foreign states.[41]

[38]Rev. Stat. sec. 4102.

[39]Act, Jan. 16, 1860, 12 Stat. 77; Rev. Stat. 4090.

[40]Moore's Digest, 2;432.

[41]Stillman vs. Man. Co., 3 Wood and M. 538; Foot vs. Edwards, 2 Blatch. 310; Miss. and Mo. R. R. vs. Ward, 2 Black 485; Wooster vs. Man.

After the assassination of President McKinley, there was diplomatic agitation for the passage of uniform laws preventing anarchistic plots, and President Roosevelt, in his message of Dec. 3, 1901, recommended legislation by congress.[42] No national statutes, except those excluding anarchists from entering the United States,[43] bear on the point, but state laws may prevent anarchistic agitation and also plots to commit other varieties of crime abroad. In a letter of Secretary Bayard in 1885,[44] in reply to a communication from the British government asking whether participation in the Irish National League was not punishable under the United States laws, it was stated that no national statutes penalized such offenses against foreign governments, but "if any person in the state of Pennsylvania take measures to perpetrate a crime in a foreign land, such an attempt, coupled with preparation to effectuate it, though not cognizable in the federal courts, is cognizable in the courts of the state of Pennsylvania. It is only necessary, to obtain legal action in such prosecution, that an oath specifying the offense be made before a state magistrate, and the state prosecuting attorney having jurisdiction of the locality notified of the initiation of proceedings."[45]

(2) Certain foreign public officers are entitled to special protection by international law; consequently a special duty of prevention is incumbent upon the government in relation to them. Diplomatic agents are the most important of these privileged foreign officers.

In 1784 the court of oyer and terminer of Philadelphia in Res Publica vs. De Longchamps[46] declared the person of a public minister "sacred and inviolable." "Whoever," said the court, "offers any violence to him not only affronts the sovereign he represents but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world." It added that the "comites" and household of the minister are like-

Co., 31 Me. 246; In re Eldred, 46 Wis. 530; Thayer vs. Brooks, 17 Ohio, 489; Armendiaz vs. Stillman, 54 Tex. 623; See Moore's Digest, 2;451.

[42]See Moore's Digest, 4;95-96: 2;432-434.

[43]Act, Mch. 3, 1903, 32 Stat. 12, 13. See Turner vs. Williams, 194, U. S. 279, (1904).

[44]See Moore's Digest, 2;432.

[45]The prevention of acts injurious to foreign states in time of war while the United States is neutral is provided for in neutrality statutes. See infra p. 114 et seq.

[46]1 Dall. 111, (1784); Moore's Digest, 4;622.

wise inviolable. In cases involving public ministers the court held that the law of nations should be applied, and in pursuance of this principle found De Longchamps criminally liable for an assault upon the Secretary of the French Legation. Much difficulty was experienced by the court in reconciling its duties as a municipal court with those as a court of international law. In the former capacity it must give a definite sentence, in the latter it must give a sentence satisfactory to the injured party, the king of France. It finally concluded that "the defendant can not be imprisoned until his most Christian Majesty shall declare that the reparation is satisfactory." Apparently a de facto incarceration without formal sentence of imprisonment, which if given at all would have to be "certain and definite," seemed the only way out of the dilemma.

This view of the status of municipal courts in performing such duties, based on Lord Mansfield's opinion in Triquet vs. Bath,[47] and the English treatment of the case of the Russian Ambassador in 1708,[48] is probably now obsolete. The state's duty is to prevent injury to diplomatic agents by any suitable means. The criminal prosecution and the kind of punishment imposed on persons assaulting ministers are thus not specified by international law. Such measures are law supplementary to international law.

By a statute of 1790[49] the "offering of violence to the person of a public minister, in violation of the law of nations" is punishable by imprisonment for not over three years, and fine at the discretion of the court. This act includes assaults upon members of the minister's household and upon his residence.[50] Appar-

[47]Triquet vs. Bath, 3 Burr 1478, (1764), Scott, 6.

[48]The arrest of the Ambassador of the Czar of Russia in 1708 gave rise to high feeling on the part of that potentate which was finally assuaged by sending a handsomely illuminated apology prepared for the occasion. As a result of this case a statute, 7 Ann 12, (1708); Scott, p. 4, was passed, to prevent other such occurrences in the future.

[49]Act Apr. 30, 1790, 1 Stat. 118, Rev. Stat. 4062-4065.

[50]U. S. vs. Hand, 2 Wash. C. C. 435; See also on scope of act, U. S. vs. Ortega, 11 Wheat. 467; Black Att. Gen. 9 op. 7, (1857); U. S. vs. Liddle, 2 Wash. C. C. 205, (1808); In re Baiz, 135 U. S. 403, (1889). Similar statute in Great Britain, 7 Ann 12, printed Scott, 4; and Cross vs. Talbot, 8 Mod. 288; Triquet vs. Bath, 3 Burr, 1478. (1764); Heathfield vs. Chilton, 4 Burr. 2015, (1767); Parkinson vs. Potter, L. R. 10 Q. B. 152, (1885); McCartney vs. Garbutt, 24 Q. B. D. 36, (1890) Scott 191-196; Moore's Digest, 4;622-628.

ently it does not include the sending of anonymous and threatening letters to a minister. In 1793, in the case of U. S. vs. Ravara,[51] tried in the United States circuit court at Philadelphia, although the statute was in force the offender was indicted at common law for sending such letters to the British minister. The court, consisting of Justices Jay and Peters, found him guilty. With the present view that federal courts have no common law jurisdiction, such a prosecution would now be impossible in the federal courts.

The duties of prevention do not stop with the protection from personal injury of the minister and his household. His jurisdictional immunity must also be protected. The courts are forbidden by statute[52] to take jurisdiction of either criminal or civil cases against public ministers or their servants, and persons executing process on such privileged characters are declared "violators of the law of nations" and subject to criminal punishment. This statute has been enforced by the courts in a number of cases.[53] Foreign consuls,[54] naval officers,[55] and persons in the military forces[56] have been held not to enjoy such immunities and are not included in the terms of the statute mentioned. Such officers are given no protection other than that accorded aliens, except in so far as special treaties provide. They are, however, recognized as being exempt from personal liability to a limited extent for acts done under authority of their government. They are therefore protected from prosecution in the state courts by an act giving the federal courts power to release from the state courts on habeas corpus, subjects of foreign states in custody for acts done, "under any alleged right, title, authority, privilege, protec-

[51]U. S. vs. Ravara, 2 Dall. 297, (1794); Fed. Cas. 16, 122. The defendant in this case was a Genoese Consul but the court held that no immunity from prosecution attached to this position. He was ultimately pardoned on condition that he give up his exequatur. See Moore's Digest, 5;65. See also Bradford, Att. Gen., 1 op. 52, (1794); Lee Att. Gen., 1 op. 71; (1797); Moore's Digest, 4;629-630.

[52]Act, Apr. 30, 1790, 1 Stat. 117, Rev. Stat. 4063-4064. The Supreme court is authorized to issue writs of mandamus to courts or public officers of the United States in cases where ambassadors, public ministers, consuls or vice-consuls are parties. Judicial Code, 1911, 36 Stat. 1087, sec. 234.

[53]Ex Parte Cabrera, 1 Wash C. C. 232; U. S. vs. Benner, Baldwin 234; Moore's Digest, 4;631-635.

[54]In re Baiz, 135 U. S. 403, (1899).

[55]Bradford Att. Gen., 1 op. 49, (1794); Nelson Att. Gen. 4 op. 336, (1844).

[56]People vs. McLeod 25 Wend. 483; See also 26 Wend. 663.

tion, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depends upon the law of nations."[57]

Where consulates are declared inviolable by treaty and public vessels are in port, the government is under an obligation to prevent violation of such places. The usual method of keeping order by the police and, if necessary, by the employment of armed force, serve to fulfill this duty.[58]

(3) It has been officially held in the United States that resident aliens owe temporary allegiance to the government, must submit to its laws, [59] are entitled to the judicial remedies for wrongs open to citizens,[60] but that the United States government is not responsible for injuries to them by acts of private trespassers.[61] The alien must get his remedy by the usual legal processes or not at all. This view, it will be seen, puts aliens on the same legal footing as citizens. They have no immunities or advantages. In fact their rights are less secure than those of citizens, for they do not enjoy political privileges, and by the alien act[62] in force from 1798 to 1801 they were liable to expulsion by

[57]Act, Aug. 29, 1842, Rev. Stat. sec. 753. This act resulted from the inability of national authority to liberate McLeod, on trial for murder in New York. The British government and the political department of the U. S. government took the view that his act, done as a soldier and recognized by the British government, was one for diplomatic reparation, and personal liability could not attach. See Moore's Digest, 2;24-30.

[58]The President may use the military and naval forces of the government and call out the militia to repel invasion, suppress insurrection and execute the laws of the Union. This includes the execution of treaties. See Act. Mch. 3, 1827, in re military and naval forces, and act, May 2, 1792, Jan. 21, 1903, Feb. 16, 1914, in re the militia, under authority of constitution, art. 1, sec. 8, cl. 14.

[59]Carlisle vs. U. S. 16 Wall. 147; Moore's Digest, 4; 9-17.

[60]Cushing, Att. Gen. 7 op. 229, (1855); Taylor vs. Carpenter, 3 Story, 458; Breedlove vs. Nicollet, 7 Pet. 413; Moore's Digest, 4;7.

[61]Nelson Att. Gen., 4 op. 332, (1844); The Resolution, Fed. Court of Appeals, 2 Dall. 1, (1781); Lincoln Att. Gen., 1 op. 106, (1802); Moore's Digest, 4;7; 6;787-791.

[62]Act, June 25, 1798, 1 Stat. 570, to be in force two years. Expulsion within three years of landing of excluded classes is permitted in the present immigration laws, Act, Mch. 3, 1903, 32 Stat. 1213, sec. 20, 21; Moore's Digest, 4;172. This however, is really a measure to enforce the *exclusion* of undesirable classes and should be distinguished from acts providing for *expulsion* of aliens, common in Europe, but represented in the United States by the single instance mentioned.

order of the president. This view denies the doctrine of international responsibility for the safety of resident aliens, yet is the one generally expressed by the United States government. When reparation has been made by the government it has been as a "gratuity." It has been denied that the government was under an obligation of international law to prevent injuries to aliens or to make reparation.[63]

This opinion to the contrary, it seems clear that responsibility is recognized in practice as a rule of international law.[64] The principle is recognized by a number of state governments in laws making counties responsible for property losses and damages caused by mob violence.[65] Even though the United States denies the theory in principle, it has generally observed it in practice. We may therefore consider the measures taken to prevent injury to aliens.

By statute it is provided that persons violating safe conducts or passports of aliens shall be criminally liable in the federal courts.[66] In numerous treaties rights of resident aliens are specified, extending to such matters as protection of life and property, right to own land, to make devises and bequests, and to have recourse to local courts of justice. In some of them it is specified that subjects of the contracting powers shall have the same rights as citizens when in the United States, and most favored nation rights are frequently guaranteed to subjects of the respective powers. Treaty rights of this character are protected by the courts applying treaties as law.[67]

The courts have held that aliens within the territory are entitled to the same protection in their personal rights as citizens and no more,[68] and this has been the principle generally acted upon in preventing injuries even when treaties do not specify such a privilege. The constitutional guarantees operate to pro-

[63]See Letter of Mr. Bayard, Sec. of State, 1886, For. Rel. 1886, p. 158, Moore's Digest, 4;826-835. See Act, June 8, 1896, Moore's Digest, 4;850.

[64]See Article by Julius Goebel, Jr., The International Responsibility of states for injuries sustained by aliens on account of mob violence, insurrection and civil war, Am. Jour. of Int. Law, 8;802, Nov. 1914.

[65]Illinois Rev. Stat., 1913, c. 38, sec. 256a-256g-256w; pp. 854, 857.

[66]Act, Apr. 30, 1790, 1 Stat. 118, Rev. Stat. sec. 4063; Moore's Digest, 4;623.

[67]Hauenstein vs. Lynham, 100 U. S. 483.

[68]Butler Att. Gen. 3 op. 254, (1837); People vs. Warren, 11 N. Y. Cr. R. 433; Moore's Digest, 4;2.

tect aliens resident in the country, though they are not effective to prevent arbitrary administrative methods in excluding aliens before arrival[69] or expelling those illegally entering.[70]

The ordinary exercise of the police power, prevention of injury to persons, and punishment of offenders is in the hands of the state governments. It is therefore upon them that the duty of preventing injury to aliens largely devolves. The principle that treaties are enforcable law enunciated by the constitution is binding upon state as well as federal courts, and states have enforced the treaty rights of aliens in cases coming before them subject to the right of appeal to the United States supreme court should such rights be neglected. A similar control may be exercised in respect to the general protection of property and personal rights by such constitutional guarantees as those prohibiting state laws "impairing the obligation of contracts", or taking life, liberty or property without "due process of law." Thus the national government can in a measure prevent the confiscation of contract debts of foreigners, a matter which has been of international importance especially in Latin American countries, although it is not clear that international law imposes such a duty.[71] But in the punishment and control of private individuals violating rights of aliens, either guaranteed by treaty or by international law, no such method of federal control over the state government exists. The international responsibility falls upon the national government. It has therefore sometimes happened that the national government has made reparation for failure on the part of the states to perform this duty of prevention even though it had by law no means of controlling the states or offering adequate protection itself.

During the decade from 1890 to 1900 a number of cases arose in which Italians were murdered or injured by mobs and in which the state authorities appear to have been lax in performing their duties of prevention. Presidents Harrison and McKinley strongly urged congress to enact laws giving the federal courts jurisdiction of cases involving injury to aliens, especially where treaty rights were involved, as was the case in the

[69]U. S. vs. Williams, 194 U. S. 292; U. S. vs. JuToy, 198 U. S. 253, 263.

[70]Zakonite vs. Wolf, 226, U. S. 212.

[71]Constitution, art. 2, sec. 10, cl. 1; amendment 14, in reference to states and amendment 5, in reference to Congress. The United States has generally refused to prosecute claims of its citizens based on contract, even where the contract was with the foreign government itself. See Moore's Digest 6;705-738, 6;285-289.

Italian outrages.[72] It seems that there is adequate constitutional basis for such legislation, both in the implied power of the national government to enforce treaties which it may constitutionally conclude, and in the power to define and punish offenses against the law of nations. W. W. Willoughby has said in this connection, "There would seem to be no valid constitutional objection to an act of congress giving to the federal courts cognizance of all offenses for which the United States may according to the law of nations be held responsible to foreign powers."[73]

INFRACTION OF TREATIES

(1) Treaties may be declaratory of international law, in which case the contracting states have no more rights and no more duties than they would have under international law. They may be amendatory of international law, such as general international conventions, in which case, after ratification, their provisions are international law and the contracting states are under new duties according to them. Or they may create exceptions to the general rule of international law, being in nature similar to contracts. In some such treaties the national obligations are made greater than under international law, as in treaties guaranteeing special protection to aliens or special protection to territory such as Panama and Cuba. In other cases the national duties are made less than they would be under international law. The protocols with Mexico relating to Indian marauders and the capitulations of Turkey and other non-Christian countries reduce the usual obligations of abstaining from exercising force and jurisdiction in foreign territory, although they add new obligations incidental to the exercise of these privileges.

Treaty stipulations are considered in this thesis in connection with the rules of international law to which they relate, the general view being taken that treaties when duly ratified are expropria vigore municipal law, and whichever one of these classes they fall into they will be enforced as such by United States courts or executive officials.

[72]Pres. Harrison's Message, Dec. 9, 1891, For. Rel. 1891, v; Moore's Digest, 6;840; Pres. McKinley's Message, Dec. 5, 1899, For. Rel. 1899, xxii, Moore's Digest, 6;846; Dec. 3, 1900, For. Rel., 1900, xxii. Moore's Digest, 6;874.

[73]W. W. Willoughby, The Am. Const. System, N. Y., 1904, p. 108. See also U. S. vs. Arjona, 120 U. S., 479, (1887), on the subject, also E. S. Corwin, National Supremacy, N. Y. 1913.

At this point the subject matter of treaties will not be considered, but rather the general method of treaty enforcement—the measures which the United States has taken to prevent the infraction of treaties.

(2) The most important provision of this character is found in the constitution of the United States, which declares that, "this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or law of any state to the contrary notwithstanding."[74]

What agreements are treaties in the meaning of this provision is a question of municipal law. The constitution requires that two-thirds of the senate concur with the president in making treaties;[75] it therefore seems that executive agreements, of which a considerable number have been concluded by the president alone,[76] would not be "the supreme law of the land" in this sense. There is undoubtedly a limit to the scope of the treaty power, from the constitutional division of power between state and national government, but where the line is to be drawn has not been defined. It certainly appears to extend beyond the legislative power of congress.[77] Ratification and proclamation also appear to be necessary before a treaty is valid in the sense of the constitution.[78] Even when these conditions are complied with and from a technical standpoint the treaty is clearly within the terms of the constitutional provision there are important limitations to its full effect as municipal law in the sense of that term as adopted in this thesis.

In this connection the dual character of the obligation imposed by treaties must be borne in mind. A treaty primarily creates obligations between states. The recognized representative of the state, that is its government, may alone be held responsible for the infraction of treaties so far as the other contracting parties are concerned. This is the only function of

[74]Constitution, art. 2, sec. 2, cl. 2.

[75]Constitution, art. 2, sec. 2, cl. 2.

[76]See Moore's Digest, 5;210-218.

[77]Chirac vs. Chirac, 2 Wheat. 259, 276, (1817); Geofroy vs. Riggs, 133 U. S. 258; Hauenstein vs. Lynham, 100 U. S. 483. Contra Prevost vs. Greneaux, 19 How. 1; Moore's Digest, 5;166; 175-179.

[78]See Moore's Digest, 5;202-210.

treaties in many countries including Great Britain. It is for the political department of the government to decide upon and enact appropriate measures for putting them into effect. Private rights under municipal law are not affected until such action is taken.[79]

In the United States, however, aside from this primary obligation imposed upon the government, treaties often impose obligations immediately upon individuals. The constitution has declared, in order to provide for the performance of the duty by the government, that treaties are law and immediately effective in altering private rights and liabilities, and the courts must take cognizance of them in that capacity. Thus in England if the government wishes to escape liability for infractions of treaties stipulating a change in private rights it must always pass statutes providing for their enforcement. In the United States this burden is shifted from congress by the constitutional provision, although in some cases additional legislation may be necessary, especially where an appropriation of money is required to make the treaty effective.

(3) This secondary function of treaties, however, is governed entirely by municipal law. Hence, although the international obligation of treaties can not be altered except by mutual consent,[80] the terms of the treaty itself,[81] or, as is generally admitted, by an entire change of the conditions upon which the treaty was founded,[82] the obligations of individuals and officers of government under it, are always subject to the will of the sovereign. An act of congress specifically abrogating a treaty,[83] or a subsequent and conflicting statute by that body,[84] will abrogate

[79]See Holland, Studies in International Law, p. 190-193, Westlake, Is International Law Part of the Law of England? L. Q. R. 22;14.

[80]See Moore's Digest, 5;319-322; 363-364.

[81]See Moore's Digest, 5;322-335.

[82]See Moore's Digest, 5;355-356. This principle is generally spoken of as the implied reservation contained in all treaties of "rebus sic stantibus." "There will be no state in the position to conclude a treaty for all time wherein lies a perpetual limitation of its own sovereignty." Heinrich Treitschke, Politik, Leipsic, 1899, 2;550.

[83]Act July 7, 1798, 1 stat. 578, abrogating French treaty of 1778. Moore's Digest, 5;356-363.

[84]Head Money Cases, 112 U. S. 580; Whitney vs. Robertson, 124 U. S. 190, (1888); The Chinese Exclusion Cases, 130 U. S. 581, (1889); Homer vs. U. S., 143 U. S. 570; LaAbra Silver Mining Co., vs. U. S. 175 U. S. 423, 460, (1899); Moore's Digest, 5;364-370.

a treaty so far as municipal law is concerned, although vested rights created under it will be protected by constitutional guarantees in the same manner as vested rights under repealed statutes.[85] The observance of a treaty, although a duty of international law, is a political question subject to the discretion of the sovereign and beyond the power of municipal law to control. However, by requiring that any such statute be unequivocal and incapable of reconciliation with the treaty by interpretation,[86] the courts of the United States can do much toward enforcing the duty of the government not to abrogate treaties. Applying this principle, United States courts have held that war does not terminate treaties. It suspends them in respect to private rights of enemy persons and brings them into effect in respect to provisions specifically related to rights during war.[87]

In addition to the power of the political department of the government to terminate treaties it also has exclusive control of many treaty provisions which are by their nature incapable of enforcement by municipal law. Treaty obligations to pay money, to cede territory, to enact laws, to enter into constructive enterprises such as the Panama Canal or to make a particular disposition of military and naval forces are addressed to the political department of the government. The courts hold them political questions and will follow the political department in interpreting them.[88] They can not be enforced as municipal law.

The only treaty provisions which are law actually enforceable by regularly constituted municipal authorities are those

[85]Chirac vs. Chirac, 2 Wheat. 259, 277, (1817); Society for the Propagation of the Gospel vs. New Haven, 8 Wheat. 464; Carneak vs. Banks, 10 Wheat. 182; Moore's Digest, 5;386-387.

[86]In re Chin A. On, 18 Fed. Rep. 506.

[87]Society for the Propagation of the Gospel vs. New Haven, 8 Wheat, 464, 494, (1823); Carneak vs. Banks, 10 Wheat. 181. Great Britain took a similar view in respect to a statute giving effect to a treaty which in terms was "to continue in force so long as the said treaty between his majesty and the United States should continue in force, and no longer." It was held that the War of 1812 did not terminate the treaty hence the statute remained valid. See 37 Geo. III, c. 97, (1797), in re treaty 1794, art 9, Sutton vs. Sutton, 1 Russell and Mylne, 663; Moore's Digest, 5;373. The United States did not agree to the Spanish claim that the war of 1898 abrogated all treaties between the two countries. See Moore's Digest, 5;375-376.

[88]Doe vs. Branden, 16 How. 635; Foster vs. Neilson, 2 Pet. 314; The Amiable Isabella, 6 Wheat. 1; Bottiller vs. Dominguez, 130 U. S. 238. Moore's Digest, 5; 241-242.

parts relating to the control of persons and inferior officers of government within the jurisdiction of the government. This enforcement may be either judicial or executive.

Judicial enforcement is secured by the power to hold invalid legislation or constitutional provisions of states in conflict with treaties,[89] to compel administrative officials to perform acts by mandamus, or to refrain from action by injunction, and to apply treaties directly as rules of decision in adjudicating private rights, such as privileges granted aliens, and foreign officers resident in the country, prize rights of neutrals and enemies in time of war, etc. By such measures as injunction, the imposition of criminal penalties and civil liability in tort, courts both state and federal may also prevent the infraction of treaty rights of alien persons or foreign states by private persons within their jurisdiction.

Executive authorities may also take measures to enforce treaties directly. It has been held that imprisonment of persons in pursuance of treaty stipulations by executive authorities, in the absence of legislation, judicial process or declaration of martial law, is not an unconstitutional exercise of power nor a deprivation of liberty without due process of law.[90] It would thus seem that executive measures appropriate to the fulfillment of treaty obligations may be effectively used under no authority other than the treaty itself.

Legislative authority is necessary to make treaties effective in many cases, especially in those requiring an expenditure of money.[91] It is generally considered to be a duty of congress to act where its aid is required,[92] but in the case of a treaty with Mexico of 1883, providing that necessary legislation should "take place within twelve months from the date of exchange of ratifications,"[93] congress failed to perform this duty. In many other cases the enforcement of treaties can be made more effective by

[89]Ware vs. Hylton, 3 Dall. 199, (1796); Chirac vs. Chirac, 2 Wheat. 259; Hauenstein vs. Lynham, 100 U. S. 483; Gordon vs. Kerr, 1 Wash. C. C. 322; Moore's Digest, 5;371-372.

[90]Ex Parte Toscano, 208 Fed. Rep. 938, (U. S. Circuit Court, Cal. 1913). See also in re Debs, 158 U. S. 564 as illustrating general executive power to safeguard broad general interest, and its application to treaty enforcement by E. S. Corwin, National Supremacy, N. Y., 1913, p. 293.

[91]See Moore's Digest, 5;221-223.

[92]Cushing Att. Gen., 6 op. 296, (1854).

[93]Treaty with Mexico, 1883, art. 8, Malloy, p. 1151. See Moore's Digest, 5;222.

legislative action. Statutes and orders imposing criminal penalties, creating administrative positions, directing public officers, etc., have often been enacted and promulgated for this purpose.

Rules contained in treaties are similar to those contained in international law in their relation to the municipal law of the United States. In both cases the rules are primarily obligatory upon the government, and in both cases, as a municipal measure to aid in the enforcement of the government's obligations, it is provided that the rules shall be part of municipal law and directly enforceable by courts and executive officers in appropriate cases. In both cases also many of the rules are by their nature incapable of immediate enforcement as municipal law, because the courts can not exercise jurisdiction over the parties or subject matter. In such cases they are political questions, and the national duties under them may be fulfilled through discretionary executive action or the enactment and enforcement of supplementary laws.

CHAPTER V. OBLIGATIONS OF VINDICATION

INTRODUCTORY

The duties of prevention relate to acts committed by private individuals for which the government is responsible, and which it is bound to prevent. The government is not responsible for acts of aliens, but international law sometimes requires it to treat violators of international law, even when they are aliens, in a specified manner. The obligation of states is not limited to the mere negative one of not doing harm to others, but as members of the family of nations they owe at least a moral duty to that society to take measures to promote its general welfare. They must vindicate their sovereignty, when foreigners violate international law in their territory or foreign criminals attempt to find refuge there, by exercising jurisdiction over such persons according to the requirements of international law. And they must vindicate their position in the family of nations by cooperating with other nations in constructive activity for the general good.

Duties of this character are for the most part in a process of becoming, rather than being already established law. In time of peace, customary international law does not require such activity, yet the progress of conventional law, in requiring duties of this character, leads to the belief that some of them may be soon recognized as obligations of the law of nations.

INTERNATIONAL COOPERATION

Such international conventions as those providing for an international bureau of weights and measures,[1] for the international protection of industrial property,[2] for the protection of submarine cables,[3] for the repression of the African slave trade,[4] for a Universal Postal Union,[5] for the protection of literary and

[1]International Bureau of Weights and Measures, 1875, Malloy, p. 1924.

[2]Convention for International Protection of Industrial Property, 1883, Malloy, p. 1935.

[3]Convention for Protection of Submarine Cables, 1884, Malloy, p. 1949.

[4]General Act for the Repression of African Slave Trade, 1890, Malloy, p. 1964.

[5]Universal Postal Conventions, 1891, 1897. Concluded by Act of June 8, 1872. See Moore's Digest, 5;220.

artistic copyrights,[6] for promoting sanitation and preventing epidemic diseases,[7] are adhered to by large numbers of states including the United States, and impose duties upon states for the general good of the civilized world. Similar duties are imposed by the Geneva and the Hague conventions, although their rules are largely declaratory of international law and define obligations owed to single states rather than those required for the general good alone. In its most recent interpretation of the Monroe Doctrine the United States appears to have recognized that it must assume certain responsibilities in connection with countries of the Western Hemisphere. The administration of customs duties on several occasions in Latin American countries, for the purpose of paying obligations owed by such countries to European nations, is an illustration of the exercise of this duty;[8] and the activity of the various Pan-American congresses indicates further special duties connected with the affairs of the new world.[9]

These obligations are spoken of as duties of international cooperation,[10] and the law regulating them as international administrative law.[11] There has been a great deal of municipal legislation for enforcing these duties, and judicial opinion interpreting them, but as they are not yet duties imposed by international law aside from convention we will not attempt to consider the subject here.

PREVENTION OF CRIME

There is, however, one duty of a similar character which is so habitually practiced and is so well established that it can almost be said to constitute a real duty of international law. That is the duty to aid in the suppression of the more serious crimes. The power of national courts to exercise extra-territorial jurisdiction

[6]Convention on Literary and Artistic Copyrights, 1902, Malloy, p. 2058.

[7]International Sanitary Convention, 1903, Malloy, p. 2066.

[8]See President Roosevelt's Annual Message, Dec. 6, 1904, For. Rel. 1904, xli; Moore's Digest, 6;596.

[9]Act May 24, 1888, Moore's Digest, 6;599-604. Treaties of the Central American Peace Conference, 1907, Malloy, p. 2391-2400. The duty of preserving order in Cuba and Panama is recognized by treaties, Cuba, 1903, p. 362-4, Panama, 1903, art. 23, p. 1356.

[10]See Moore's Digest, 2;466-488.

[11]See P. S. Reinsch, International Unions and their administration, Am. Jour. Int. Law, 1;579-673. (1907): Int. Adm. Law and National Sovereignty, Am. Jour. Int. Law, 3;145, (1909); Public Int. Unions, Boston, 1911; Hershey, Essentials of Int. Pub. Law, p. 5, bibliography, p. 14.

on the high seas for the punishment of pirates is well recognized by international law, and it seems that a positive duty to exercise this authority and suppress piracy is likewise fairly established. A government that does not take adequate measures to suppress piracy may expect other governments to intervene and punish pirates even within its jurisdiction.[12] The slave trade conventions have recognized a similar obligation to suppress this commerce. The municipal measures which the United States has taken to perform these duties have been discussed.[13]

Attempts have been made to conclude international conventions requiring states to prevent the emigration of criminals from their territory and to establish international police bureaus for the detection of criminals, but it can not be said that international law as yet imposes obligations of this character.[14] The duty of punishing its own criminals and giving up criminals seeking asylum in its territory to the state where the crime was committed is sometimes considered a duty of international law,[15] and it certainly is a duty very commonly observed. However, the assertion that states are positively required by international law to extradite criminals appears to be erroneous. Extradition is not a duty of international law.[16] In the absence of a treaty, states are not under an obligation to surrender criminals. The duty has, however, been so universally acknowledged by conventional law that a brief consideration of the laws of the United States relating to its enforcement may be appropriate.

EXTRADITION

That no legal obligation to extradite criminals exists in the absence of treaty has been affirmed by courts and political officers of the United States.[17] There have, however, been some cases of

[12]See the Amelia Island case, President Monroe's message, Nov. 17, 1818, Moore's Digest, 1;173: 2;406-408.

[13]Supra, pp. 34-36.

[14]Such efforts have been made especially in reference to the suppression of anarchists; see Moore's Digest, 4;95-96: 2;432-434.

[15]See Sir. E. Clarke, A treatise on the Law of Extradition, 4th ed. 1903, ch. 1; Chancellor Kent, In Matter of Washburn, 4 Johns Ch. 105, 107, (N. Y.); Hershey, op. cit., p. 263, note 69.

[16]See Moore on Extradition, 1;13-20: Moore's Digest, 4;245.

[17]Commonwealth vs. Deacon, 10 S. and R. 125; U. S. vs. Rauscher, 119 U. S. 407; Terlinden vs. Ames, 184 U. S. 270, 289, (1902); Moore's Digest, 4;245-246.

extradition without treaty, but the act has been described as one dictated by courtesy rather than by legal obligation.[18] The international duty recognized by the United States, therefore, is that of obeying the extradition treaties.

(1) Provision for extradition of murderers and forgers was made in the treaty with Great Britain of 1794, in force till 1807.[19] The first general extradition provision was in the Webster-Ashburton treaty of 1842 with Great Britain.[20] Since that time treaties have been concluded with almost all important countries,[21] and they generally specify that persons indicted for the more serious crimes shall be extradited. Express exclusion is ordinarily made of political offenders.[22]

Although there have been some state laws providing for extradition to foreign governments,[23] the better opinion seems to be that the national government alone has the power to deliver up fugitives from foreign countries.[24] National statutes[25] since 1848 have provided for the apprehension and preliminary trial by federal courts of persons whose extradition is requested, although it has been held that, treaties being law, the courts can perform such functions in the absence of statute.[26] The courts have held

[18]See case of Arguelles, Moore on Extradition, 1;33: Moore's Digest, 4;249.

[19]Treaty with Great Britain, 1794-1807, art. 27, Malloy, p. 605.

[20]Treaty with Great Britain, 1842, art. 10, Malloy, p. 655.

[21]Eighty-four treaties with fifty countries have been concluded. The independent states with which there appear to be no treaties at present are as follows: Roumania, Bulgaria, Greece, Montenegro, Paraguay, Uruguay, China, Persia, Siam, Liberia, Abyssinia. There is no extradition treaty with the German Empire, but treaties are in effect with the North German Union and the folowing states of the empire: Baden, Bavaria, Bremen, Hanover, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Prussia, Schamberg-Lippe, Wurtemburg.

[22]Ornelas vs. Ruiz, 161 U. S. 502, (1896); In re Ezeta. 62 Fed. Rep. 972; Moore's Digest, 4;332-354.

[23]Treaty with Mexico, 1861, art. 2; Law of New York, 1822, p. 134, N. Y. Rev. Stat. 1827, declared unconstitutional in People vs. Curtis, 50 N. Y. 321, (1872); Moore on Extradition, 1;53: Moore's Digest, 4;240.

[24]Holmes vs. Jennison, 14 Pet. 540, 579, (1840); Legare, Att. Gen. 3 op. 661, (1841); People vs. Curtis, 50 N. Y. 321, (1872); U. S. vs. Rauscher, 119 U. S. 407, 414, (1886).

[25]Act. Aug. 12, 1848; 9 Stat. 302, act. June 22, 1860, 12 Stat. 83, Rev. Stat. sec. 5270-5280.

[26]A number of extradition treaties were concluded before the first statute in 1848, and extraditions were made under them. See The British

that extradition need not be given for offenses not specified in the treaty, but the meaning of the offense named in a treaty will be determined by the law of the country where it was committed.[27]

(2) Constitutional guarantees require that "due process of law" be given to persons in the territory of the United States before extradition. This necessity is satisfied if evidence sufficient to warrant commitment for trial in the United States[28] or to indicate probable guilt[29] is forthcoming, even though the party is to be extradited to foreign territory under military occupancy of the United States, where the usual forms of trial guaranteed to inhabitants of the United States may not be had.[30] Many countries refuse to extradite their citizens, and a number of treaties to which the United States is a party specifically exempt them, but the United States does not recognize this exemption in the absence of specific treaty provision.[31]

(3) The actual surrender of the accused is an executive act and is performed by the president through the secretary of state, except in certain treaties with Mexico,[32] in which the state authorities along the frontier are given power to surrender accused persons within their jurisdiction. The treaties themselves furnish sufficient authority for the exercise of this power,[33] but it can not be exercised until the evidence has been heard and certification given by the proper judicial authority.[34] It seems that even after such certification the president's power is not merely administrative. He may in his discretion refuse to surrender a

Prisoners, 1 Wood and M. 66; (U. S. C. C., 1845) U. S. vs. Watts, 14 Fed. Rep. 130; U. S. vs. Rauscher, 119 U. S. 407; Moore's Digest, 4;270-273. U. S. vs. Robbins, Bees Admr. 266; Matter of Metzger, 5 How. 176, (1847). See E. S. Corwin, National Supremacy, N. Y., 1913, p. 277 et. seq.

[27]This is frequently required by the terms of the treaty. See Benson vs. McMahon, 127 U. S. 457, 466, (1880); In re Farez, 7 Blatch. 345, Moore's Digest, 4;273-278.

[28]Nelson Att. Gen., 4 op. 201, (1843); Moore's Digest, 4;388-391.

[29]In re Ezeta, 62 Fed. Rep. 972.

[30]Act. June 6, 1900, 31 Stat. 656, providing for extradition to territory under military government, and Neeley vs. Henkel, 180 U. S. 109, (1901), upholding the statute, Moore's Digest, 4;287-306.

[31]Neeley vs. Henkel, 180 U. S. 109, (1901); Moore's Digest, 4;287-306.

[32]Treaty with Mexico, 1861, art. 2, Malloy, p. 1126.

[33]Terlinden vs. Ames, 184 U. S. 270, 289, (1902); Moore's Digest, 4;397-399.

[34]Cushing, Att. Gen., 6 op. 217, (1853); Nelson, Att. Gen., 4 op. 240, (1843).

person found liable by the courts.[35] The ultimate fulfillment of the duty of extradition is therefore a political rather than a legal one according to the law of the United States. Municipal law can not compel the president to deliver criminals, although after action by the courts it is undoubtedly his duty to do so, except in extraordinary cases.

RETURN OF DESERTING SEAMEN

The return of deserting seamen to their vessels is a matter resembling extradition. As in that case, international law imposes no duty in the absence of treaty,[36] but the United States has assumed the obligation in a number of treaties,[37] and statutes[38] have provided that deserting seamen may be seized on application of the consul of a foreign government having an appropriate treaty with the United States, and on proof of desertion be delivered up to the consul. It has been held that seamen consigned to vessels being built for a foreign government and still in dry dock are within the meaning of these treaties and statutes.[39]

At the present time, international law imposes no duties of vindication on states in time of peace, although it requires them to observe treaties and international conventions, imposing new duties of this character upon them. The rapid multiplication of these treaties in recent times and the almost universal acceptance of the principles of some of them indicate that, in certain fields, cooperation and mutual aid have become recognized as essential to the life of civilized nations, and while states may not yet be under a legal obligation to accede to such treaties or the principles they embody, international comity certainly imposes a moral obligation which cannot be long neglected. The rules of municipal law enforcing these moral obligations of cooperation in humanitarian and industrial matters and mutual aid in the suppression of crime are therefore closely related in international importance to like measures enforcing positive legal obligations of international law. The accession to treaties of this kind is a purely political matter and beyond the control of municipal law, but the usual measures for enforcing treaties in the United States apply when once they are concluded.

[35]See Moore's Digest, 4;399-400.

[36]Tucker vs. Alexandroff, 183 U. S. 424, 431, 467-469; Cushing Att. Gen. 6 op. 148, 209; Moore on Extradition, sec. 408; Moore's Digest, 4;417-420.

[37]This provision has been contained in fifty-two treaties with thirty-five countries.

[38]Rev. Stat., 5280; on procedure, see Rev. Stat. sec. 4079-4081.

[39]Tucker vs. Alexandroff, 183 U. S. 424.

CHAPTER VI. OBLIGATIONS OF REPARATION

INTRODUCTORY

Reparation is a duty owed by a state in case of a failure to observe any of its obligations under international law. If it commits any forbidden acts itself, or fails to prevent its subjects from doing so, it must make amends to the injured state or its subjects. This applies to violations of the duties of states when neutral or belligerent, as well as in time of peace. To enumerate the occasions on which reparation is due would, therefore, be to recapitulate practically the whole of this paper. It is not the purpose of this chapter to discuss the occasions upon which the United States has given reparation, but rather to consider the general laws by which the duty to make reparation is enforced.

Like all obligations of international law, reparation is primarily a duty of states. No matter who the perpetrator of the wrong, whether a private person or a diplomatic officer, if it is a breach of international law the state will be held liable. Viewed from this standpoint, reparation is beyond the control of municipal law. As an obligation upon the sovereign power, municipal law can lend no effective sanction, although it can, by proper constitutional agreements, insure a distinct recognition, both national and international, of the authority which is to be considered the responsible agent of sovereignty in this respect, and can furnish a machinery whereby the demands required by a just observance of the duty of reparation may be made known.

Furthermore, although the state is ultimately held responsible, material reparation may often be had more expeditiously by direct recourse to the private person, officer or department of government immediately at fault. Municipal law may enforce the duty of such persons and departments to make reparation.

It is true that the municipal enforcement of the duty to make indemnity incumbent upon the immediate perpetrators of the wrong is often used as a basis for denying the duty of "reparation" altogether, using the term to signify solely an idemnification by the government of the state at fault.[1] This view is be-

[1]See especially Secretary of State Evarts and Secretary of State Bayard, official correspondence on Chinese outrages, 1880-1885, Moore's Digest, 6;820-835.

lieved to be untenable. If a breach of international law has been committed, the state through its recognized government is responsible, no matter what advantages of recourse to the immediate party at fault its municipal law may give. The duty of the government to make reparation can only be escaped by proof that the tort was not one of international law. If it is admitted that international law requires a state to give reasonable protection to aliens in its territory, then an injury to such aliens by mob violence implies an obligation of reparation and indemnity by the government, no matter what remedies from the immediate perpetrators, through courts of justice, municipal law may permit. Escape from the obligation of the government can only be based on a denial of the statement that international law imposes such an obligation of prevention.

But although the state can not escape the obligation to make reparation for breaches of international law, through its government, this does not prevent it providing other means by which the injured party may obtain reparation, through municipal law. Such municipal remedies may be more rapid and satisfactory to all parties concerned than recourse to the government through diplomatic channels. If satisfaction is obtained from the person or officer guilty the state's duty of reparation is fulfilled, and to its fulfillment in this manner municipal law may lend a sanction. The question may therefore be treated under two heads, (1) reparation by the national government, (2) reparation by inferior governmental divisions, public officers and private persons.

REPARATION BY THE NATIONAL GOVERNMENT

Under the constitution, exclusive control of foreign relations is in the hands of the national government of the United States. In this field it is sovereign. The municipal law of the United States can not compel it to observe its duties of reparation. On numerous occasions the duty has been recognized, through the voting of indemnities by congress, the authorization of salutes to a foreign flag or public apology, but it has been done as a matter of policy, comity, foreign pressure or sense of international obligation, not from any coercion of municipal law.

Although the duty of the national government to make reparation can not be compelled by municipal law, the probability of the duty being performed will be greatly increased if municipal law (1) places no obstacles in the way of such performance, and (2) establishes a machinery for the determination and set-

tlement of claims for reparation. Municipal law may thus be of great importance in the fulfillment of this international duty.

(1) The obstacles if any which the constitutional system of the United States places in the way of an adequate performance of the duties of reparation will be considered according to the character of those duties. Reparation may take the form of (a) apology, or salute of a foreign flag, (b) cession of territory, (c) pecuniary indemnity, (d) punishment or surrender of offenders, or (e) release of persons held in custody in contravention of international law.

(a) Such formal modes of reparation as apology and salute of the flag are entirely executive in nature. The president through his control of foreign relations exercises unrestrained discretion in these matters.[2]

(b) Reparation by cession of territory generally results from war. The United States demanded such indemnity, although it can scarcely be called reparation, in the Mexican and Spanish wars, but it has never made cessions for this reason itself. The power to cede territory is generally agreed to be inherent in the treaty power, consequently, if necessary, reparation of this character could be made by the president with the advice and consent of two-thirds of the senate.[3]

(c) Pecuniary indemnity is the most common form of reparation, and it clearly cannot be made without the express consent of congress. Congress by the constitution has control of the purse, and consequently no indemnity can be paid without an appropriation by it, although lump appropriations for the general purpose of settling claims might be voted, to be expended at

[2]For reparation by apology see The Trent Affair. No formal apology was made, but Great Britain recognized the return of Mason and Slidell and Secretary of State Seward's note as equivalent to the apology demanded. Moore's Digest, 7;771. For reparation by salute of flag see case of French Consul subpoenaed in San Francisco, Moore's Digest, 5;80; case of The Florida seized in Brazilian territorial waters, Moore's Digest, 7;1091; Case of Spanish consulate attacked at New Orleans, Moore's Digest, 6;813.

[3]Lattimer vs. Poteet, 14 Pet. 14. There has been dicta to the effect that the consent of a state is necessary before any of its territory may be ceded. See Geofroy vs. Riggs, 133 U. S. 267; Insular cases, 182 U. S. 345, though in this case the court admitted that territory of a state might be ceded to buy peace after a disastrous war without such consent. See Butler, Treaty Making Power, 1;411-413; 2;238, 287-294; Moore's Digest, 5;171-175.

executive discretion. As the steps leading to reparation and the correspondence on the subject are conducted by the president, a failure on the part of congress to appropriate for a reparation the validity of which had been admitted by the executive, might lead to serious trouble. As a matter of fact congress appears to have followed the recommendations of the president in this respect.[4]

However, the probability of the national government paying indemnities depends somewhat upon its control of the actual perpetrators of the wrong. The breach of international law may have been through an act of the national government itself or an agent acting under express authority, in which case no such question would arise. It may have been through the unauthorized act of an officer of the national government abroad or within the territory of the United States. As such officers if military or naval are under the constant control of the government through courts martial and military law and if civil are under executive control and are frequently bonded, the government would have no grounds for denying its responsibility from this cause.

Where the offense has been committed by a state officer or a private citizen within the territory of a state, it seems to be settled that the constitution does not bar the national government from prosecuting the offender in its own courts if his act violates international law or a treaty.[5] It is also clear that no such jurisdiction may be exercised unless statutes specifically provide for it.[6] Statutes have provided for the extension of the jurisdic-

[4]As examples of pecuniary indemnity voted by congress, see Case of Spanish Consul, Act, Aug. 31, 1852, 10 Stat. 898; Mch. 3, 1853, 10 Stat. 262, Moore's Digest, 6;814-818; Rock Springs Anti Chinese Outrage, Oct. 19, 1888, 25 Stat. 565,566; Italian Lynchings, New Orleans, 1891, Moore's Digest, 6;840; Colorado, June 8, 1896, Moore's Digest, 841; Hahnville, La., July 19, 1897, 30 Stat. 105,106; Tallulah, La., 1899, Moore's Digest, 6;846; Erwin, Mass., Mch. 3, 1903, 33 Stat. 1032; English Seaman injured, New Orleans, June 8, 1896; Mexican Lynching, Yreka, Cal., July 17, 1898, 30 Stat. 653; in Texas, March 3, 1901, 31 Stat. 1010.

[5]W. W. Willoughby, The Am. Const. System, N. Y., 1904, p. 108; E. S. Corwin, National Supremacy, N. Y., 1913; U. S. vs. Arjona, 120 U. S., 479, (1887).

[6]On the strictly statutory character of the jurisdiction of federal courts except the supreme court see U. S. vs. Worral, 2 Dall. 384, (1798), and general terms of judiciary act of 1789, Rev. Stat. 687-750 granting less jurisdiction than is included under constitutional provisions. Somewhat contra see In re Debs, 158 U. S. 564, 584, saying, "Every government is en.

tion of federal courts over persons violating diplomatic immunities, and over a few specified offenses against foreign states,[7] but no such provision has been made where the offense is against the general rights of aliens or consuls residing within the country. It is not surprising, therefore, that for offenses of this character the United States has been very reluctant to admit a duty of reparation. Where it can not punish offenders, or take measures to prevent a recurrence of outrages, the national government has felt that it is not legally responsible, and where it has made indemnity has done so as a "gratuity" rather than an obligation.[8] If, however, as appears to be the case, international law imposes a duty of preventing injury to resident aliens, no such plea will avail. The United States government is the only authority within the territory of the United States known to foreign states, and will be held responsible for violations of international law or treaties, whether it in fact can control the guilty persons or not. It therefore seems that statutes should give the federal courts jurisdiction over offenders of this character.[9]

(d) Frequently the injured state has specifically demanded the punishment of offenders as reparation.[10] Here also the con-

trusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, and has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." The supreme court appears to have an inherent jurisdiction by the constitution subject to the power of congress to limit it, but as positive grants of jurisdiction by congress are held to negative all other jurisdiction, its jurisdiction in reality extends no further than provided by statute. See U. S. vs. Moore, 3 Cranch 159,170,172; Durousseau vs. U. S. 6 Cranch 307,313; Ex Parte McCardle, 7 Wall. 506, 513.

[7]Supra, p. 71 et seq.

[8]See Diplomatic correspondence and congressional action on indemnities for injury to Spanish consul, 1851, Chinese Outrages, 1880-1885, Italian Lynchings, 1891-1901, etc., Moore's Digest, 6;811-849. In the last of the Italian cases the act of congress Mch. 3, 1903, 33 Stat. 1032, appropriated $5,000 "out of humane considerations without reference to the question of liability therefor to the Italian Government." Moore's Digest, 6;849.

[9]See Messages Pres. Harrison, Dec. 9, 1891; Pres. McKinley, Dec. 5, 1899, Dec. 3, 1900, Moore's Digest, 6;840,846-847, in which such legislation is recommended.

[10]See case of French Privateers, 1811, Moore's Digest, 6;809; Chinese Outrages, Denver, Colo., 1880, Moore's Digest 6;820; Italian Lynching, New Orleans, 1891, Moore's Digest, 6;838.

stitutional division of power between state and national governments has offered an obstacle to the performance of this demand. In the case of army and naval officers[11] and civil officers of the United States government, misconduct in office is made a crime against the United States, and offences by such officers are cognizable by federal courts. The same is true of persons guilty of violating the immunities of foreign diplomatic officers, or the obligations of neutrality, and a few other acts forbidden by international law, such as counterfeiting foreign securities. No statutes have, however, given the federal courts criminal jurisdiction of persons violating rights of aliens guaranteed by treaty or international law, and consequently unless the state government, which cannot feel the pressure of international responsibility, chooses to prosecute such offenders,[12] the duty will not be performed. The constitution undoubtedly permits such an extension of federal jurisdiction, and it would seem that the adequate enforcement of international obligations demands it.

In the place of punishment of offenders against international rights, states have sometimes demanded as a reparation that they be delivered up for punishment by its own tribunals. This was demanded by the Russian Czar upon the arrest of his ambassador in London in 1708,[13] and by the King of France upon the assault of his secretary of legation at Philadelphia in 1784.[14] The demand was refused in both of these cases and it seems that no such obligation of reparation exists under international law. A state may extradite fugitives from justice in its territory for offenses committed abroad,[15] but the theory of territorial sovereignty upon which international law is so largely based places it under no obligation to surrender persons for acts committed

[11]On court martial punishment of the commander of the United States vessel Wachusett, in reparation for the seizure of the confederate cruiser Florida in Brazilian territorial waters, see Moore's Digest, 7;1090.

[12]The Continental Congress recommended that the states prosecute offenses against the Law of Nations, (Res. Nov. 23, 1781, Journ. Cong., 7;181, Ford ed., 21;1137) and offered to pay for the prosecution of such offenses, (Res. Aug. 2, 1779, Ibid., 5;232, Ford ed., 14;914).

[13] See statement of this case in Triquet vs. Bath, 3 Burr, 1478, (K. B. 1764), Scott, 6., Holland, studies in international law, p. 187.

[14]Res Publica vs. De Longchamps, 1 Dall. 111, (Pa. 1784).

[15]In countries which adhere to the theory of jurisdiction by nationality even extradition for offenses committed abroad is refused in the case of their own subjects. See Italian refusal to extradite its subjects even when no exemption was specified in treaty. Moore's Digest, 4;290-297. In this case Italy punished the persons whose extradition was asked.

within its own jurisdiction. To do so would be to acknowledge an extra-territorial effect of the laws of the foreign country. International law may require a state to punish offenders as a reparation for international wrongs, but it does not require it to submit them to the punishment of the injured state.

(e) On several occasions the release of officers or persons held under public authority has been the form of reparation demanded. Where the person is held by the executive or judicial authority of the national government, that authority can grant release, in the former case by executive action as in the Trent affair of 1861;[16] in the latter by writ of habeas corpus which may be instituted by executive authority, or by a direct statutory prohibition of jurisdiction as in the case of foreign diplomatic officers.[17]

Where the person is held by authority of a state court, again an obstacle may be presented to the effective fulfilling of international duty, as was illustrated in the case of McLeod,[18] an English soldier, held by authority of the state of New York for an alleged murder, and whose release was demanded by Great Britain. In this case the national government was unable to effect a release, and as a consequence a statute[19] was soon after passed providing that persons held by state authority whose release was demanded on grounds of international law might be brought before the federal courts on habeas corpus, in which case the national authorities might upon satisfactory evidence bring about a release. The statutory provisions excluding cases against diplomatic agents from the jurisdiction of state courts altogether, remove this obstacle from the release of such persons by national authority.

It seems that the constitution offers no obstacle to the observance of all national duties of reparation. The principle of national supremacy in the fields constitutionally delegated to the national government, including foreign relations, permits of legislation by congress and the exercise of jurisdiction by federal courts, "necessary and proper" to fulfill all duties required by international law or treaty.[20] However, additional legislation to

[16]On release of Mason and Slidell as a reparation for their illegal seizure from the British vessel Trent, see Moore's Digest, 7;768-770.

[17]Act, Apr. 30, 1790, 1 Stat. 117, Rev. Stat. sec. 4063-4064.

[18]People vs. McLeod, 25 Wend. 483, (N. Y. 1841) in which an application for a writ of habeas corpus was refused by the state court. See Moore's Digest, 2;24-25.

[19]Act, Aug. 29, 1842, Rev. Stat. 753, Moore's Digest, 2;30.

[20]See Pomeroy, J. N., An introduction to the Constitutional law of

make some of this constitutional power effective seems to be necessary.

(2) The fulfillment of the duty of reparation may be secured by the provision of an adequate machinery for prosecuting claims for reparation. The final method for prosecuting any claim for reparation is the resort to force by way of intervention, reprisal or war. Observance of the "duty" of reparation, if it can be called a duty under such coercion, is a matter of policy and certainly requires no additional sanction from municipal law. We have to do solely with the duty of making repartion for acknowledged breaches of international law.

The prosecution of claims for reparation may be by, (a) judicial means provided by municipal law, (b) diplomacy, or (c) arbitration.

(a) By an act of 1855[21] a court of claims was established, at first as an advisory body, but later[22] as a court with power to compel payment of money from general appropriations for that purpose. Aliens are permitted to prosecute suits in the court of claims if their government accords a like privilege to the United States citizens, and most European governments have been included in this class.[23] The jurisdiction of the court extends over claims founded on acts of congress, executive regulations, contracts express or implied with the United States, damage cases not sounding in tort and all claims referred to it by either house

the United States, 9th ed., N. Y., 1886, p. 571 Corwin, E. S., National Supremacy, N. Y., 1913, passim.

[21]Act, Feb. 24, 1855, 10 Stat. 612.

[22]Act, Mch. 3, 1863, 12 Stat. 765. Under this act the court was still simply advisory, as the Secretary of the Treasury had a discretionery power to revise its decision; consequently the supreme court refused the appellate jurisdiction given to it. (Gordon vs. U. S., 2 Wall. 561). This difficulty was remedied by the act of Mch. 17, 1866, see also Tucker act, Mch. 2, 1887, 24 Stat. 505, U. S. Rev. Stat. 1059, 1089, Judicial Code, 1911, 36 Stat. 1087, sec. 142,180.

[23]Act, July 27, 1868, 15 Stat. 243; Rev. Stat. 1068. Judicial Code Privileges accorded subjects of Great Britain, (U. S. vs. O'Keefe, 11 Wall. 178; Carlisle vs. U. S. 16 Wall. 147) Belgium, (DeGive vs. U. S. 7 Ct. Cl. 517); France, (Rothschild vs. U. S. 6 Ct. Cl. 204; Dauphin vs. U. S. 6 Ct. Cl. 221); Italy, (Fichera vs. U. S. 9 Ct. Cl. 254); Prussia, (Brown vs. U. S. 5 Ct. Cl. 571); Spain, (Molina vs. U. S. 6 Ct. Cl. 571); Switzerland, (Lobsiger vs. U. S. 5 Ct. Cl. 687). See Roger Foster, A Treatise on Federal Practice, Civil and Criminal, 5th ed., 3 vols., Chicago, 1913, 3;2309.

of congress.[24] It is expressly stated, however, that the jurisdiction does not extend to claims "growing out of or dependent upon treaty stipulations entered into with foreign nations or with Indian tribes."[25] As the court's jurisdiction is limited to the express terms of statute it does not extend to claims based on general international law. The court therefore could not aid in enforcing the national duty of reparation unless congress had first acted, except in so far as the obligation to pay contract debts may be considered a duty of international law.

(b) Diplomatic representation is the most frequent method of presenting demands for reparation. These must be presented to the Department of State and must come from a foreign government through its diplomatic representative in the United States.[26] The Department of State will not listen to a claim presented by a foreign private person and congress will not consider any alien claims not coming through the Department of State.[27] The action of the Department of State upon claims is entirely discretionary, and its recommendation to congress although generally followed has no controlling effect. Congress having acted, it would seem that the payment of claims becomes a purely administrative act and the foreign claimant can have recourse to the court of claims on the authority of this statute, or to an action of mandamus to compel payment by the Secretary of the Treasury or the Secretary of State.

(c) The conclusion of arbitration treaties and the determination to submit any particular claim to arbitration are political questions and beyond the power of municipal law to control. The United States has concluded a large number of special as well as general arbitration treaties.[28] The former usually specify the procedure to be observed and the subjects to be submitted to the jurisdiction of the arbitral court.[29] The latter provides that all

[24]Act, Feb. 24, 1855, 10 Stat. 612; Rev. Stat. 1059. Judicial Code, Act, Mch. 3, 1911, 36 Stat. 1087, sec. 145, District courts now exercise a concurrent jurisdiction in these matters, Ibid., sec. 24.

[25]Act, Mch. 3, 1863, 12 Stat. 765, sec. 9, Judicial Code, 1911, 36 Stat. 1087, sec. 153.

[26]U. S. vs. Diekelman, 92 U. S. 520, Moore's Digest, 6;607-609.

[27]Magoon's Reports 338; see also 43 Cong., 1st Sess., Report No. 496, committee on war claims, May 2, 1874; Moore's Digest, 6;608.

[28]Supra, p. 26, note 18.

[29]It has been held that decisions of an arbitral court beyond its competence as defined by treaty are void. See Comegys vs. Vasse, 1 Pet. 193; Trevall vs. Bache, 14 Pet. 95; Judson vs. Corcoran, 17 How. 612; Moore's Digest, 7;30-33.

questions of a class or all questions except those of a specified class shall be submitted to arbitration, yet although treaties are, by the constitution, the law of the land, cases do not come before arbitral tribunals automatically. The submission of any case is a political question, upon which the executive power of the government has discretion.

A claim having been submitted to arbitration and an award given, the matter is subject to enforcement by municipal law. It has been held that an arbitral decision is final and as binding on the courts as an act of congress.[30] It would therefore seem that the payment of the award is purely administrative in character, and can be compelled by mandamus. This however is not true in cases in which the award has been for the United States, and its citizens claim payment. If it develops that fraud was practiced, the United States government can reopen the whole matter and refuse payment to its citizens.[31] The arbitral decision is *res judicata* as between the governments, but not as between the government and its own subjects.

Although the submission of questions to arbitration even under general treaties is a political question and beyond the control of municipal law, the establishment of a mode of procedure by means of such treaties and of a permanent panel of judges as is provided by the Hague conventions undoubtedly affords an important sanction to the equitable fulfillment of duties of reparation. The establishment of a permanent court of arbitration with recognized jurisdiction, as was attempted and notably favored by the United States' delegation at the second Hague conference, would add an even more effective sanction of similar character.

REPARATION BY INFERIOR GOVERNMENTAL DIVISIONS, PUBLIC OFFICERS, AND PRIVATE PERSONS

As has been stated, the national government of the United States is primarily responsible for all breaches of international law by itself or its citizens and reparation for such torts may always be expected from it. This does not, however, prevent the injured party seeking reparation from inferior governmental organs, officers, or individuals. We may therefore consider the mu-

[30]Comegys vs. Vasse, 1 Pet. 193, 212. La Ninfa, 75 Fed. Rep. 513, (1896).

[31]Frelinghuysen vs. Key, 110 U. S. 63; Boynton vs. Blaine, 139 U. S. 306; U. S. vs. LaAbra Silver Mining Co., 32 Ct. Cl. 462, (1897); LaAbra Silver Mining Co. vs. U. S., 175 U. S. 423, (1899). See Moore's Digest, 7;65-68.

nicipal measures enforcing the duty of such persons to make reparation.

(1) The constitution permits the extension of the jurisdiction of federal courts to controversies "between a state or the citizens thereof, and foreign states, citizens or subjects,"[32] but not to "suits in law or equity commenced or prosecuted against one of the United States * * by citizens or subjects of any foreign state."[33] The exemption does not extend to suits prosecuted by foreign states. It therefore seems that so far as the constitution is concerned, a foreign state could bring action for reparation against one of the commonwealths of the union in the federal courts although its subjects acting individually could not. The statutes, however, have not provided for such a jurisdiction; consequently there have been no such actions. Foreign states have always asserted that the government of the United States is the only authority recognized by them as responsible, and have refused to have direct recourse to state governments, even when the state has offered to make indemnity.[34]

Some states have established courts of claims in which they may be sued under limitations,[35] and a number of them have provided by law for the responsibility of cities and counties for property losses and lynchings.[36] These methods of recovery are open

[32]Constitution, art. 3, sec. 2, cl. 1.

[33]Constitution, Amendment 11.

[34]See case of French Privateers, 1811, in which the State of Georgia offered to make indemnity for injury to French seamen in Savannah. Moore's Digest, 6;809.

[35]Illinois Act, Mch. 23, 1819, Laws 1819, p. 184; Act, Jan. 3, 1829, Rev. Laws, 1832, p. 593, repealed Rev. Stat. 1845, p. 464, permitting the auditor of Public Accounts to be sued for the state. Ill. Act, May 29, 1877, laws, 1877, p. 64, creating a commission of claims "to hear and determine all unadjudicated claims of all persons, against the state of Illinois" and submit them to the auditor of public accounts who is to lay them before the general assembly. Ill. Act, May 16, 1903, laws 1903, p. 140, creating a court of claims with a similar authority. See N. Y. Laws, 1870, c. 321; 1876, c.444; 1883, c.205; 1897, c.36; Mass. Rev. Laws, c.201. See Freund, Cases on Administrative Law, St. Paul, 1911, p. 363-367.

[36]As examples, see Ill. Rev. Stat. 1913, c.38, sec. 256a-256g, p. 854, making a city or county liable for three-fourths damages for property losses caused by a mob of over twelve persons, with the proviso that such liability does not prevent recovery from individual perpetrators; c.28, sec. 256w, p. 857, creating a liability of $5000 upon counties and cities for lynchings, recoverable by the survivors of the person lynched.

to aliens or foreign sovereigns under the usual provisions opening courts to such persons.

(2) Recourse against private persons or officers of government may be had by either foreign individuals or sovereigns.[37] Such suits may also be commenced in the name of a foreign state.[38] Foreign states or persons bringing such suits have the advantage of the usual principles of law applicable to suits brought for the recovery of claims or damages by citizens.[39] The foreigner in such a case has the additional advantage of an option in bringing his case in either the state or federal courts. By the constitution the jurisdiction of the federal courts may be extended to controversies "between a state or the citizens thereof, and foreign states, citizens or subjects," and statutes have provided for the exercise of this jurisdiction as to such suits against citizens.[40]

The usual principles of liability of officers apply in suits brought by aliens as well as by citizens. In principle Anglo-American law considers officers liable for wrongful acts, in which case they would be liable for torts violating international rights of foreign states or persons.[41]. The tendency, however, is to relieve officers from such liability either by statute or judicial deci-

[37]King of Spain vs. Oliver, 2 Wash. C.C. 429.

[38]The Saphire, 11 Wall 164 and Moore's Digest, 2;85-87. English cases, U. S. vs. Prioleau, 35 L. J. Ch. N. S. 7, (1865); U. S. vs. McRae, L. R. 8 Eq. 69, (1869); Moore's Digest, 1;65-66.

[39]Cushing, Att. Gen., 7 op. 229, (1885); Taylor vs. Carpenter, 3 Story 458; State vs. Chue Fan, 42 Fed. Rep. 865; Crashley vs. Press Pub. Co., 179 N. Y. 27, (1904); Moore's Digest, 4;7-9.

[40]Constitution art. 3, sec. 2, cl. 1. United States district courts have jurisdiction of civil suits where the matter of controversy is over $3,000 "between citizens of a state and foreign states, citizens or subjects," (Judicial Code, 1911, 36 Stat. 1087, sec. 24, cl. 1) and "of all suits brought by any alien for a tort only in violation of the Law of Nations or of a treaty of the United States" (Ibid, sec. 24, cl. 17). All suits of which district courts have original jurisdiction, or in which the parties are of diverse citizenship and there is danger of local prejudice, may be removed from state courts to U. S. district courts by motion of the defendant. (Ibid. sec. 28). Most of these provisions were in the Judiciary act of 1789, Rev. Stat. sec. 563, cl. 16, sec. 629, cl. 1. Removal of cases involving aliens to circuit courts was provided in an act of Aug. 13, 1888, 25 Stat. 434, sec 2, on which see New Orleans Co., vs. Rabasse, 10 So. 708, Breedlove vs. Nicolet, 7 Pet. 413. The circuit courts were abolished by the judicial code of 1911, sec. 289.

[41]Little vs. Barreme, 2 Cranch 170, (1804).

sion when they act in good faith, the state sometimes assuming the liability in such cases. The responsibility of private persons would be governed by the law of torts and contracts of the state where the action was brought, the same remedies generally being open to the alien as to a citizen.[42]

[42]See reference to this mode of indemnification in letter of Secretary of State Bayard, For. Rel. 1886, p. 158, in reference to Chinese Outrages at Rock Springs, Wyo., 1885, in which reference is also made to the right of aliens to remove cases to federal courts. Moore's Digest, 6;831-832.

PART II. OBLIGATIONS AS A NEUTRAL TOWARD BELLIGERENTS

CHAPTER VII. INTRODUCTORY

The obligations of neutral states have been classified by Holland[1] as obligations of (1) abstention, (2) acquiescence and (3) prevention. To these Lawrence[2] adds two, the duties of (4) restoration and (5) reparation.

(1) The obligations of abstention peculiar to neutrality relate to matters which the state itself must obstain from doing, and are outside of the jurisdiction of municipal law. Whether a state by performing its duties of abstention shall remain a neutral, or whether by refusing to perform them it intervenes and thus itself becomes a belligerent is a question which is always to be determined by the political departments of the goverment. Municipal law can not in any way effect the power of the state thus to exercise its sovereignty. It may be noted that certain acts of abstention are specifically required by one of the Hague conventions of 1907. Thus neutral states are required to abstain from partiality in dealing with belligerents, from supplying belligerent powers with "warships, ammunition, or war material of any kind," and from partiality in applying "conditions, restrictions and prohibitions" upon the admission of belligerent warships or prizes into their territorial waters.[3] By the constitution[4] treaties are declared to be a part of the law of the land; consequently these provisions might be regarded as rules of municipal law. In reality, as they are directory upon the state itself they can not be enforced by any regularly constituted state authority, so scarcely deserve that title. They are rules directory upon the political organs of government, but are not enforceable rules of municipal law. The duties of obstention discussed under the law of peace likewise apply to states in time of neutrality.

[1]T. E. Holland, Neutral Duties in Maritime War, Proceedings of the British Academy, 2;2, quoted Moore's Digest, 7;863.

[2]T. J. Lawrence, The Principles of International Law, 4th ed., N. Y., 1910, p. 629.

[3]Hague Conventions, 1907, v, art. 9, xiii, arts. 6, 9.

[4]Constitution, art. vi, sec. 2.

(2) The neutral state's obligations of acquiescence are entirely passive. They require the state to submit without protest to incidental inconveniences and detractions from its ordinary rights under international law caused by the operation of acknowledged privileges of belligerents. The most prominent of these inconveniences is the loss to its subjects which results from the exercise of belligerent rights in interfering with maritime commerce such as the right of visit and search, seizure, and confiscation after adjudication for breach of blockade, contraband trade, unneutral service and similar acts. A neutral state must also acquiesce in occasional losses by its citizens resident in belligerent countries, when such losses are incidental to the conduct of hostilities. The duty of acquiescence simply requires the acknowledgment by the neutral state that the ordinary rights of its citizens under international law are modified in their relations with a belligerent community or state. The form which a breach of this duty would take would be the making of unwarranted diplomatic protests or intervention. As in the case of abstention both of these acts are prerogatives of sovereignty and incapable of limitation by municipal law. The duties of acquiescence connected with exemptions from territorial jurisdiction and servitudes apply to states in neutrality as well as in peace.

(3) The duty of prevention requires a state to prevent unneutral acts by its citizens and agencies of government, and the unneutral use of its territory. It is in this field that municipal law is most essential for the preservation of neutral obligations.

(4) The duty which Lawrence has in mind when he speaks of "restoration" is the duty which a neutral state is under to restore to the original owner[5] prizes captured in its waters or illegally brought to its ports. It seems that the use of the term restoration as describing this duty is unfortunate as it implies that the duty is one owed to the power to whom the prize is restored. If this were true, if the owner of the vessel captured in violation of neutrality had a right to its restoration, he could make his claim if the vessel were in the custody of a belligerent as well as a neutral prize court. This, however, is not the case. It is a recognized principle that the owner of the vessel can not claim restoration in a belligerent prize court, on the ground that the seizure was in violation of the neutrality of a third state.[6] The

[5]Lawrence, op. cit., p. 649.

[6]"A capture within neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the neutral sovereign that

prize is restored not as a reparation to the state from which it was taken, but as a vindication of its own neutral rights by the neutral state.[7] Like international cooperation and the extradition of criminals, it is an obligation growing out of the general interest of humanity which requires the greatest possible restriction of the area of war. Unlike them, however, it is a duty required by international law even in the absence of treaty stipulations, and reparation may be demanded in case of failure to observe it.[8] We will therfore include the duties which Lawrence discusses as duties of "restoration" in the subject "obligations of vindication." There are other obligations which will logically be included in this subject, such as that to intern belligerent troops entering neutral territory and to enforce observation of the twenty-four hour stay and twenty-four hour interval rules by belligerent vessels taking asylum in its ports.

(5) The duty of reparation refers to the obligation which a neutral state is under to make suitable amends to the injured belligerent for a failure to perform any of its other duties as a neutral. The reparation may assume the forms of payment of damages, restoration of property or public apology. The payment by Great Britain of the Alabama claims award in 1871 is a classic

its legal validity can be called in question; and as to him only it is to be considered void." The Ann, 3 Wheat. 435, 447, (1818). See also, The Adela, 6 Wall. 266, (1867); The Sir Wm. Peel, 5 Wall. 535; The Lilla, 2 Sprague, 177; The Florida, 101 U. S. 37, (1879). English cases, The Eliza Ann, 1 Dods. 244, (1813); The Purissima Conception, 6 Rob. 45, (1805); The Diligentia, 1 Dods. 404, 412, (1814); The Etrusco, Lords, 1795, 3 Rob. 31; The Vrouw Anna Catherina, 5 Rob. 144. See Scott, Cases, pp. 684-691; Moore's Digest, 6;1000, 7;511,1089.

[7]If the property has been captured within the jurisdiction of the neutral, the neutral "may indeed inflict pecuniary or other penalties on the parties for such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured." La Amistad de Rues, 5 Wheat. 385. See also La Estrella, 4 Wheat. 298, (1819); The Santissima Trinidad, 7 Wheat. 283,496. Fenwick, op. cit. p. 90, says: "Where vessels have been fitted out and armed or have increased their force, in violation of the neutrality of the United States, the courts of the United States will intervene to effect a restitution of prizes captured by such vessels, not because the capture is illegal as between the captor and the former owner, but because the neutral state has the right to vindicate its own sovereignty by divesting possession of property acquired as the result of a violation of its sovereignty."

[8]Commodore Stewart's Case, 1 Ct. Cl. 113, (1864), Scott, 910. Infra p. 134, note 25.

example of the performance of this duty. There are no duties of reparation peculiar to the law of neutrality. The provisions of United States law enforcing this duty in time of peace apply equally well to the enforcement of obligations arising in time of neutrality.

We will then consider the municipal measures enforcing the obligations of the United States as a neutral under two heads, (1) the obligations of prevention, and (2) the obligations of vindication.

It is probably desirable to present in more detail the basis of distinction between these two classes of duties. The duty of prevention differs from the duty of vindication in that the former relates to certain obligations a neutral state is under in reference to its own subjects and territory, while the latter is concerned with the treatment of foreign subjects and agencies of government. International law does not define the means which a state must take in performing its duties of prevention. It is of no international importance whether it chooses to control its subjects and the use of its territory by means of criminal penalties, requirements of bonds or other guarantees, or the use of military force; so long as it exercises "due diligence" or "the means at its disposal," the methods are entirely a matter of internal policy. On the other hand, in performing the duty of vindication the state is dealing with persons who are not its own subjects. It is really acting as an agent of the society of nations to adjudicate a breach of international law. Consequently that society is interested in the method of treating these violators of international duty, and specifies in international law that illegal prizes shall be restored, belligerent troops shall be interned, vessels illegally in ports shall be expelled or sequestrated, etc.

In general, therefore, the municipal rules enforcing duties of prevention consist of rules supplementary to international law, while those enforcing duties of vindication consist of rules of international law which are also rules of municipal law.

It may be added that the same act may entail obligations of both kinds. A neutral state may be required to prevent a specified infraction of its neutrality. If it is unsuccessful in preventing this act, it may be required to vindicate its neutrality in a particular manner. Thus a neutral state is under an obligation to prevent hostilities in its territorial waters. Yet if a prize is there taken in spite of its efforts, the duty of vindication requires it to adjudicate this prize and restore it to its situation before capture.

CHAPTER VIII. OBLIGATIONS OF PREVENTION.

TREATY PROVISIONS

(1) The United States has recognized certain duties of prevention as incumbent upon it by treaty. Many of the early treaties of the United States contain an artiele stipulating for the preservation of "perpetual peace and amity" between the two parties.[1] In Henfield's case,[2] which arose in 1793, such provisions in the treaties with Netherlands[3], Prussia[4], and Great Britain[5] were made one of the bases for the government prosecution of a person accused of accepting a commission from France who was at war with these countries. General principles of international law were also relied on in the case, but the main support for the indictment seemed to be that Henfield's acts were prohibited by these treaties, which were law in the United States. Though the court accepted this view at that time, it is clear that criminal indictments could no longer be supported under such general treaty provisions[6], and as a matter of fact few treaties now in force contain the perpetual peace and amity clause in the mandatory form it assumed in the early treaties.

By another common provision in early treaties the contracting parties bound themselves when neutral to prevent their

[1]As an example of this kind of treaty may be mentioned that with France, in force from 1778 to 1798, which said, "There shall be a firm, inviolable, and universal peace and a true and sincere friendship between" etc., Malloy, p. 469. The same phrase introduces the treaty with Sweden of 1783, p. 1725; with Prussia, 1785-1796, p. 1477; with the Netherlands, 1782-1795, p. 1234; with Great Britain, 1794, p. 591. Most of these treaties have been abrogated or superseded and the more recent treaties generally relate to particular subjects such as commerce, extradition, consular privileges, etc., and do not contain the specific peace and amity clause. This, however, is not universally true. The treaty with Spain of 1902 begins with an article of the character formerly so common, p. 1701.

[2]In re Henfield, Fed. Cas. 6360, (1793).

[3]Treaty with the Netherlands, 1792-1795, art. 1, Malloy, p. 1234.

[4]Treaty with Prussia, 1785-1796, art. 1, Malloy, p. 1477.

[5]Treaty with Great Britain, 1794-1807, art. 1, Malloy, p. 591.

[6]U. S. vs. Worral, 2 Dall. 384, (1798); U. S. vs. Hudson, 7 Cranch 32, (1812).

subjects from accepting privateering commissions or letters of marque to serve against the other.[7] Often the stipulation was added that offenders were to be punished as pirates.[8] Such provisions were frequently mentioned by the courts as the basis for assuming jurisdiction over prizes brought into United States ports, and for restoring them to their original owners when it was proved that the captor was an American citizen operating under a foreign letter of marque.[9] No criminal prosecutions have, however, been instituted under strength of the treaty provisions alone, although there would seem to be greater warrant for such action than under the general peace and amity provisions invoked in the Henfield case. On the contrary, the court in The Bello Corrunes, commenting on the fact that the acceptor of a certain commission to cruise against Spain ought to be indictable as a pirate according to the treaty with that country, expressed the opinion that under the "free institutions of this country" such action would probably be impossible.[10] The fact that this duty was undertaken as a privilege, accorded to the contracting party, indicates that it was not regarded as a duty demanded by international law. Privateering itself is now prohibited by international law and states are therefore under the general obligation to prevent the acceptance of letters of marque by their subjects. The matter is

[7]The acceptance of letters of marque to serve against the contracting party is forbidden in the following treaties: France, 1778-1798, art. 21, Malloy, p. 475; Bolivia, 1858, art. 25, p. 121; Central America, 1825-1839, art. 24, p. 167; Chili, 1832-1850, art. 22, p. 178; Colombia, 1824-1836, art. 22, p. 299, 1846, art. 26, p. 310; Dominican Republic, 1867-1898, art. 25, p. 411; Ecuador, 1879-1892, art. 25, p. 428; Guatemala, 1849-1874, art. 24, p. 868; Hayti, 1864-1905, art. 31, p. 929; Netherlands, 1782-1795, art. 19, p. 1239; Peru, 1870-1886, art. 28, p. 423; 1887-1899, art. 26, p. 1439; Prussia, 1785-1796, art. 20, p. 1483; 1799-1810, art. 20, p. 1493; 1828, art. 12, p. 1499; Salvador, 1850-1870, art. 26, p. 1545; 1870-1893, art. 26, p. 1559; Spain, 1795-1902, art. 14, p. 1645; Sweden, 1783, art. 23, p. 1733, renewed, 1827, art. 17, p. 1754; Venezuela, 1860-1870, art. 25, p. 1853; Great Britain, 1794-1807, art. 21, p. 603.

[8]It is provided that offenders shall be treated as pirates in the following of the above treaties: Colombia, Ecuador, Guatemala, Netherlands, Peru, Prussia, Salvador, Spain, Sweden, Great Britain.

[9]Talbot vs. Jansen, 3 Dall. 133; The Bello Corrunes, 6 Wheat. 152, (1821).

[10]The Bello Corrunes, 6 Wheat. 152, (1821); Treaty with Spain, 1795-1902, art. 14, Malloy, p. 1645.

mentioned in few if any particular treaties in force, but is considered in general law-making treaties and in statutes.

Article 22 of the treaty with France, of 1778, made it unlawful for foreign privateers other than those of France "to fit their ships" in the ports of the United States, or to sell or exchange prizes which they had captured or to purchase provisions in excess of an amount necessary to supply them to the nearest home port. Since an implied exception was made in the case of France[11] it seems that the duties here mentioned were not at that day conceived of as duties imposed by international law. Similar provision, without the exception for the benefit of the contracting parties, has been inserted in a number of other treaties.[12] The special privilege accorded to France in this respect was the basis of much diplomatic difficulty in the early days of the United States, and it was finally abrogated in 1798[13] by act of congress. It is now clear that the duty to prevent the fitting out of armed vessels is required by international law, and no nation can be accorded special privileges in this regard compatibly with the continued maintenance of neutrality. The United States recognized this fact in the treaty of Washington with Great Britain in 1871.[14] Article six of that treaty stated that a neutral government is bound to exercise "due diligence" to prevent (1) the fitting out within its jurisdiction of vessels intended to cruise against foreign states and the departure of such vessels, and (2) the use of its ports or waters as a "base of naval operations" for the augmentation of military supplies or for the recruitment of men. Although this treaty was concluded with the immediate purpose of furnishing a basis for adjudicating the so called Alabama claims, both countries expressly declared their intention to be bound for the future by these provisions. The treaty is still in force and is law in the United States.

[11]Treaty with France, 1778-1798, art. 17, 18, Malloy, p. 475.

[12]The selling of prizes, fitting out of privateers, and purchasing of victuals by warships except sufficient to reach the nearest home port is prohibited to enemies of the contracting party in the following treaties: France, 1778-1798, art. 22, Malloy, p. 475; 1800-1809, art. 25, p. 504; Dominican Republic, 1867-1898, art. 24, p. 411; Hayti, 1864-1905, art. 31, p. 929; Venezuela, 1860-1870, art. 24, p. 1853; Great Britain, 1794-1807, art. 24, p. 604.

[13]Act of July 7, 1798, 1 stat. 578.

[14]Treaty of Washington, with Great Britain, 1871, Malloy, p. 703.

(2) The greater part of these duties formerly stipulated for in treaties with single countries have now been incorporated in the Hague conventions and thus given more definite recognition as principles of international law. Those dealing with neutral duties are, however, by their terms binding only when all of the parties in the war are signatories.[15] These conventions require a neutral state to prevent, by the use of force if necessary, the transportation of troops across its territory, or the use of neutral territory for erecting wireless stations or for recruiting.[16] but it is stipulated that no obligation exists to prevent individuals crossing its frontiers for foreign service, or the exportation of arms by private persons.[17] In reference to naval war, the neutral must use the "means at its disposal" to prevent the making of captures in territorial waters, the setting up of belligerent prize courts in its territory, or the use of its ports as a "base of naval operations."[18] The principle of the treaty of Washington, requiring the neutral state to prevent the fitting out or departure of armed vessels from its shores, is embodied practically verbatim.[19] The neutral state is also required to prevent belligerent war vessels and prizes, enjoying the right of asylum in its ports, from exceeding the privileges accorded them by international law. Thus it must enforce the twenty-four hour stay and twenty-four hour interval rules and must prevent the carrying out of repairs by war vessels other than those "absolutely necessary to render them seaworthy," and the augmentation of their fighting force or armament. Fuel may only be given sufficient to reach the nearest home port and only once in three months in the same port to vessels of the same belligerent power.[20] Failure to enforce these rules would constitute the neutral port a "base of naval operations."

As treaties are declared by the constitution to be part of the law of the land, it would seem that executive officers and courts are justified in assuming authority to carry out any of these provisions, even in the absence of express statutory authority. This view was upheld in the case of Ex parte Toscana.[21] This case does not relate to a duty of prevention, but to the provision of

[15]Hague Conventions, 1907, v, art. 20; xiii, art 28, Malloy, pp. 2290-2352.

[16]Ibid., v, arts. 2-5, 10; xiii, art. 5.

[17]Ibid., v, arts. 6-8, xiii, art. 7.

[18]Hague Conventions, 1907, xiii, arts. 2, 4, 5, 25, 26.

[19]Ibid., xiii, art. 8.

[20]Ibid., xiii, arts. 13, 14, 16-21.

[21]Ex parte Toscana, 208 Fed. Rep. 938, (1913).

the Hague convention of 1907 requiring a neutral state to vindicate its sovereignty by interning belligerent troops crossing its frontier. It would seem that if executive officers have power to perform that duty under authority of the treaty alone, a similar exercise of authority in performing duties of prevention would be upheld. Undoubtedly criminal prosecutions could not be undertaken solely under authority of the conventions,[22] but it is believed that this case is authority for the view that executive action temporarily restraining property or persons, for the purpose of carrying out any of the duties of prevention required by treaty, would be upheld as valid and not in conflict with constitutional guarantees of "due process of law," etc.

There are, however, statutory means provided for the more effective enforcement of most of the duties of prevention defined in these treaties, as well as those required by the general principles of international law not specified in treaties or international agreements.

STATUTORY PROVISIONS

(1) In 1794 the first neutrality statute was enacted.[23] It defined certain actions on the part of citizens of the United States in aid of one of the belligerents as subject to criminal punishment, and gave administrative authority for the enforcement of these provisions.

The enactment of this statute was the outgrowth of two events, (1) the neutrality proclamation of the president and (2) the unsuccessful attempt to obtain a criminal conviction for a breach of neutrality under treaties, these proclamations and the common law. Washington's neutrality proclamation of April 22, 1793,[24] after reciting the state of war which existed and the intention of the United States to remain neutral, said, "I have

[22]On lack of a common law criminal jurisdiction in federal courts see U. S. vs. Worral, 2 Dall. 384, (1798), U. S. vs. Hudson, 7 Cranch 32, (1812). A federal criminal jurisdiction based on treaties and international law was upheld in In re Henfield, Fed. Cas. 6360 (1793) and U. S. vs. Ravara, 2 Dall. 297, Fed. Cas. 16,122, (1793).

[23]Act June 5, 1794, 1 stat. 381.

[24]Proclamation, April 22, 1793, 11 stat. 753; Am. St. Pap., For. Rel., 1:140; Compilation of the Messages and Papers of the Presidents, 1789-1897, J. D. Richardson, ed., 10 vol., Washington, 1896-1899, 1:157. See also Rules adopted by the cabinet as to the equipment of vessels in the ports of the United States by belligerent powers, Aug. 3, 1793, Richardson's Messages, 10:86.

given instructions to those officers to whom it belongs to cause prosecution to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war or any of them." This proclamation was followed by a more vigorous one of March 24, 1793,[25] which specified various offences against neutrality which would be regarded as criminal, and especially "required all courts, magistrates and other officers * * to exert the power in them severally vested to prevent and suppress such unlawful assemblages and proceedings and to bring to condign punishment those who may have been guilty thereof."

The contents of these proclamations indicate the belief that breaches of neutrality by individuals could be punished without specific statute, and this view was upheld by the court in the case of Gideon Henfield. Henfield, who was accused of serving on board a French vessel, was brought to trial in the summer of 1793 after Washington's first proclamation and before his second. The United States Circuit court of Pennsylvania, composed of Justices Wilson, Iredell, and Peters, charged the jury to find Henfield guilty of breaches of neutrality because he had violated the law of nations which was part of the common law, be-

[25]Proclamation, March 24, 1794, 11 stat. 753; Richardson's Messages, 1:157. Neutrality proclamations of similar character have been issued by the president in succeeding wars in which the United States has been neutral. Franco-Prussian War, (Aug. 22, Nov. 8, 1870, 16 stat. 1132; Richardson's Messages, 7; 86; 89): Russo-Japanese War, (Feb. 11, 1904, 33 stat. 2332): Turco-Italian War, (Oct. 24, 1911, 37 stat. 1719): Great War, (Aug. 4-27, 1914, Supp. Am. Jour. Int. Law, 9;1 Jan. 1915). On a number of occasions neutrality proclamations have been issued calling attention to a state of insurrection or insurgency, when belligerency has not been recognized, and to the provisions of the neutrality laws applicable in such circumstances. Revolt of Spanish colonies, (Nov. 27, 1806; Sept. 1, 1815, Richardson's Messages, 1;404, 561): Canadian Insurrection, (Jan. 5; Nov. 21, 1838; Sept. 25, 1841, 11 stat. 784-786; Richardson's Messages, 3;481-482, 4;72): Cuban Filibusters, (Aug. 11, 1849; April 25, 1851; May 31, 1855, 11 stat. 787; Richardson's Messages, 5;7,111,272): Mexican Filibusters, (Oct. 22, 1851; Jan. 18, 1854, Richardson's Messages, 5;112,271): Nicaraguan Filibusters, (Dec. 8, 1855; Oct. 30, 1858, 11 stat. 789,798; Richardson's Messages, 5;388,496): Fenian Invasion of Canada, (June 6, 1866; May 24, 1870, 14 stat. 813; 16 stat. 1132; Richardson's Messages, 6;433: 7;85): Cuban Revolution, (Oct. 12, 1870; June 12, 1895; July 27, 1896, 16 stat. 1136; 29 stat. 870,881; Richardson's Messages, 7;91, 9;591, 694); Insurgency in Dominican Republic, (Oct. 14, 1905, 34 stat. 3183): Mexican Revolution, (Mch. 2, 12, 1912, 37 stat. 1732-1733).

cause he had violated certain treaties of peace and amity between the United States and some of the belligerent powers, and because he had endangered the safety and security of the United States. In spite of this the jury refused to find Henfield guilty largely on account of the popular republican sympathy for revolutionary France.

In order to prevent the recurrence of such an event the president urged upon congress the passage of a neutrality act specifying crimes against neutrality and fixing adequate penalties. The result was the act of June 5, 1794,[26] already mentioned. Since that time neutrality acts of similar character have been constantly in force in the United States.[27]

For some time after the passage of this act there was doubt whether such offenses were not indictable at common law, in the federal courts, in the absence of a specific act. It was only gradually that the doctrine that federal courts enjoy no common law jurisdiction, developed. In the case of the United States vs. Ravara,[28] which involved the sending of threatening letters to a diplomatic minister, the United States Circuit court of Pennsylvania maintained its jurisdiction in a criminal case at common law. In the cases of the United States vs. Worral[29] in 1798 and United States vs. Hudson[30] in 1812, the latter in the supreme court of the United States, the theory of a common law jurisdiction in federal courts was denied and since then this view has in the main been adhered to. It thus appears that in the present state of the law, in the absence of statute, offenses against neutrality would not be criminally punishable.

[26]Act June 5, 1794, 1 stat. 381.

[27]The act of June 5, 1794, (1 stat. 381) was to last two years. It was renewed Mch. 2, 1797, (1 stat. 497), amended, June 14, 1797, (1 stat. 520) and made permanent April 24, 1800, (2 stat. 54). This was amended by the temporary act of Mch. 3, 1817 (3 stat. 370) and the whole statute was revised in the permanent act of April 20, 1818, (3 stat. 447). A temporary amendment was passed March 10, 1838, (5 stat. 212). The act of 1818 was repeated in the Revised Statutes of 1878 (sec. 5281-5291) and with a few alterations in the Penal Code of 1910, (35 stat, 1088, sec. 9-18, 303). Acts of April 22, 1898, (30 stat. 739), March 14, 1912, (37 stat. 630) and March 4, 1915, should be regarded as amendments to the neutrality statutes. For excellent discussion of the neutrality laws, giving the authoritative interpretation by the courts, see C. G. Fenwick, The Neutrality Laws of the United States, Washington, 1913, passim.

[28]U. S. vs. Ravara, 2 Dall. 297, Fed. Cas. 16,122, (1793).

[29]U. S. vs. Worrall, 2 Dall. 384, (1798).

[30]U. S. vs. Hudson, 7 Cranch 32, (1812).

(2) The crimes defined by the neutrality statutes may be roughly classified as (a) accepting commissions, (b) enlisting in the service of a belligerent, (c) setting on foot military or naval expeditions, and (d) using the territory of the United States as a base of military or naval operations.

(a) "Accepting and exercising" a commission within the United States for service against a foreign state is a crime when performed by United States citizens.[31] There has been only one prosecution under this provision, that of Isaac Williams in 1797.[32]

(b) Enlisting in the service of a foreign state or political body within the territory of the United States, or "hiring or retaining" others to do such an act or to leave the country with "intent" to do so is a crime for either citizens or aliens,[33] but it has been held that the section does not forbid leaving the country with intent to enlist abroad, either individually[34] or in parties.[35]

(c) "Setting on foot military expeditions" within the territory of the United States is made a crime[36] and has been held to apply even though the expedition is directed against unrecognized insurgents.[37] Hostile "intent" must, however, be proved.[38] A mere departure of bodies of men, even with arms, may not constitute a "military expedition" in the meaning of the statute.[39] Several sections of the neutrality statutes were designed particularly to prevent the "fitting out and arming"[40] and

[31]Rev. Stat. sec. 5281, Penal Code of 1910, 35 stat. 1088, sec. 9.

[32]U. S. vs. Isaac Williams, 2 Cranch, 82, note., Fed. Cas. 17,708, (1797). See also charge to Grand Jury, McLean, Fed. Cas. 18,265, (1838).

[33]Rev. Stat., sec. 5282, Penal Code of 1910, sec. 10.

[34]U. S. vs. Hertz, Fed. Cas. 15,337, (1855), U. S. vs. Kazinski, Fed. Cas. 15,508, (1855).

[35]U. S. vs. Nunez, 82 Fed. Rep. 599; U. S. vs. O'Brien, 75 Fed. Rep. 900. On this offense see also Lee, Att. Gen., 1 op. 63; Cushing, Att. Gen., 7 op. 377; In re Henfield, Fed. Cas. 6360, (1793).

[36]Rev. Stat., sec. 5286, Penal Code of 1910, sec. 13.

[37]Wiborg vs. U. S., 163 U. S. 632; U. S. vs. O'Sullivan, Fed. Cas. 15,974. Contrary The Three Friends, 166 U. S. 1. See also letter of Secretary of State Bayard, July 31, 1855, For. Rel., 1855, p. 776, and 21 op. 267.

[38]U. S. vs. O'Sullivan, Fed. Cas. 15,975.

[39]U. S. vs. Hart, 74 Fed. Rep. 724. Other prosecutions under this section see, U. S. vs. Hart, 78 Fed. Rep. 868; U. S. vs. Lumsden, Fed. Cas. 15,641; U. S. vs. Murphy, 85 Fed. Rep. 609; U. S. vs. Ybanez, 53 Fed. Rep. 536; U. S. vs. Hughes, 75 Fed. Rep. 267. See also Charge to Grand Jury, McLean, Fed. Cas. 18,267, (1851).

[40]Rev. Stat. sec. 5283, 5284, Penal Code of 1910, sec. 11,303.

"augmenting the force"[41] of privateers. These were important in the days of the Napoleonic wars and the revolts of the Spanish and Portuguese colonies in South America in the early nineteenth century, and there were many prosecutions under them.[42] With the revolution in naval architecture which the use of steel has brought, and the abolition of privateering by the Declaration of Paris of 1856, privateering by individuals is no longer important, although there were prosecutions under these provisions as late as 1891 for fitting out naval expeditions for use in Spanish American revolutions.[43] This same change, however, has made the construction and sale of an armed vessel to a belligerent a violation of neutrality in itself.[44] There have been efforts to apply these provisions to prevent the sale of armed vessels to belligerents. The courts have, however, held that an "intent" to use the vessel in hostilities must be shown, and "intent" implies more than a mere knowledge of the use to which it will be put.[45] There is no provision making the bona fide sale of ves-

[41]Rev. Stat. sec. 5285; Penal Code of 1910, sec. 12.

[42]Criminal Prosecutions, see, U. S. vs. Guinet, 2 Dall. 321, (1795) Scott 695; U. S. vs. Smith, Fed. Cas. 16,342a, (1806); U. S. vs. Skinner, Fed. Cas. 16,309, (1818); U. S. vs. Quincy, 6 Pet. 445, (1832), Scott 706; U. S. vs. Trumbull, 48 Fed. Rep. 99, (1891), Scott 731. See also Nelson, Att. Gen., 4 op. 336, (1844). Forfeiture of vessels, see, Ketland vs. The Cassius, Fed. Cas. 7743; Gelston vs. Hoyt, 3 Wheat. 246, (1818); The Meteor, Fed. Cas. 9498, (1866), reversed, Fed. Cas. 15,760, Scott 711; The Mary N. Hogan, 18 Fed. Rep. 529; U. S. vs. 214 Boxes of Arms, 20 Fed. Rep. 50; The City of Mexico, 28 Fed. Rep. 148, (1886); The Carondolet, 37 Fed. Rep. 799, (1899); The Conserva, 38 Fed. Rep. 431; The Three Friends, 166 U. S. 1, (1897); The Itata, 56 Fed. Rep. 505; The Laurada, 85 Fed. Rep. 760, (1898). Restoration of prizes captured by war vessels, see infra pp. 135-136.

[43]U. S. vs. Trumbull, 48 Fed. Rep. 99, (1891), Scott 731.

[44]See Scott 720, note. A modern steel warship constitutes a "military expedition" in itself and it cannot be treated as other articles of contraband, the sale of which by private persons is permissible. See Snow, cases, p. 437-438; Editorial Comment, J. B. Scott, Am. Jour. Int. Law., 9;177, Jan. 1915.

[45]The Meteor, Fed. Cas. 15,760, reversing Fed. Cas. 9,498; The Santissima Trinidad, 7 Wheat. 283; LaConception, 6 Wheat. 235; The Bello Corrunes, 6 Wheat. 152; U. S. vs. Quincy, 6 Pet. 445; The Laurada, 98 Fed. Rep. 983; Moodie vs. The Alfred, 3 Dall. 307; 5 op. 92. The contrary view was offered by Attorney General Legare, (3 op. 747) and by Justice Betts, in the Meteor, (Fed. Cas. 9,498) although his decision was reversed on this point in the Circuit court, (Fed. Cas. 15,760). The correctness of the

sels to a belligerent a crime, although it was acts of this kind which the United States complained of in the Alabama Claims controversy.[46]

(d) Certain acts which would constitute the ports or territory of the United States a "base of naval or military operations" have been made criminal offenses. The setting on foot of military expeditions, the fitting out and arming of privateers, or augmenting of their force have been mentioned. A joint resolution of April 22, 1898,[47] authorizing the president to prohibit the exportation of coal or military material. This was amended on March 14, 1912[48] making such exportation a penal offense except under exemptions specified by the president. This applies only after the president has made a proclamation that "conditions of domestic violence" exist in an "American country" and are being promoted by "munitions of war procured from the United States." An act of March 4, 1915[49] authorized the presi-

interpretation which excludes the sale of armed vessels from the prohibition of the section is indicated by the fact that a bill to prevent the sale of armed vessels to belligerents was presented in the House of Representatives in 1817. It was lost in the Senate. (See Annals of Congress, 14th Cong., 2nd sess. p. 719). Also in 1866, when popular sympathy was aroused over the Fenian uprising and it was felt that the neutrality laws were too strict, a bill was presented in the House to prevent the recurrence of a decision similar to that of Justice Betts in the Meteor which had recently been given. The bill consisted of a revision of the neutrality acts including the provision that nothing be construed to prevent the sale of armed vessels to belligerents. This bill was also lost in the Senate. (See Cong. Globe, 39th cong. 1st sess. p. 4194-4197, and House Report, No. 100, 39th cong., 1st sess). On this general subject see Fenwick, op. cit. pp. 37, 48-49, 108-109.

[46]On the Alabama award see, Moore, Int. Arb., 1;495-682, 4;4057-4178; 5;4639-4685; Moore's Digest, 7;1059-1076; Montague Bernard, Historical account of the neutrality of Great Britain during the American Civil War, London, 1870; Caleb Cushing, The Treaty of Washington, N. Y., 1873; Scott, 713-720.

[47]Act April 22, 1898, 30 stat. 739. This joint resolution was a war measure, intended to conserve to the United States the supplies of war material manufactured in the country and had no connection with obligations of neutrality but it was used as a basis for the neutrality proclamation of President Roosevelt, on Oct. 14, 1905, (34 stat. 3183), forbidding the exportation of arms to Dominican Republic where a revolution was going on. See Fenwick, op. cit. p. 56.

[48]Act, March 14, 1912, 37 stat. 630.

[49]Act, March 4, 1915, 38 stat. 1226.

dent to direct customs officers to detain vessels which are suspected of carrying fuel, arms, men, or supplies to foreign warships hovering outside of the harbor, and persons engaged in thus using American territory as a base of naval operations are subject to criminal indictment. The provisions of this act were suggested by a circular of the Department of State of September 19, 1914,[50] in which the detention of vessels engaged in such unneutral acts was authorized.

Fines ranging up to $10,000, imprisonment ranging up to ten years, and forfeiture of unneutrally used vessels and other property are provided for these various offenses.[51]

(3) Besides the criminal provisions, statutes have provided other means for preventing infractions of neutrality. District courts are given jurisdiction of vessels fitted out in violation of neutral duties with authority to condemn them.[52] The president is authorized to employ the military and naval forces of the country to enforce the provisions of the act after judicial process shall have been ineffective,[53] and to require foreign vessels to depart from ports of the United States when such stay would be contrary to international law or treaty.[54] United States minis-

[50]Circular of the Department of State, Sept. 19, 1914, Supp. Am. Jour. Int. Law., 9;122, Jan. 1915.

[51]Penalties: Accepting foreign commission, fined not over $2,000, imprisoned not over 3 years, (Penal Code of 1910, sec. 9); enlisting in foreign service, $1,000, 3 years, (P. C. sec. 10); setting on foot military expedition, $3,000, 3 years, (P. C. sec. 13); fitting out and arming vessel, $10,000, 3 years, or 10 years if to cruise against United States citizens, and forfeiture of vessel, (P. C. sec. 11,303); augmenting force of vessel, $1,000, 1 year, (P. C. sec. 12); exportation of arms to American country when prohibited by proclamation, $10,000, 2 years, (Act, March 14, 1912, 37 stat. 630); supplying belligerent vessels from United States ports, $10,000, 10 years, (Act, March 4, 1915).

[52]Rev. Stat. sec. 5383, Penal Code of 1910, sec. 12.

[53]Rev. Stat sec. 5287, Penal Code of 1910, sec. 14. Only military, not civil force may be used under this authority, see Gelston vs. Hoyt, 3 Wheat. 246; Nelson, Att. Gen., 4 op. 336, (1844). This view somewhat modified, 21 op. 273.

[54]Rev. Stat. sec. 5288, Penal Code of 1910, sec. 15. Fenwick expresses the opinion that this section, the same as the preceding, authorizes the president to act only when judicial action is impossible, through lack of jurisdiction due to the public character of the vessel or of sufficient evidence to permit of successful prosecution. It seems, however, as though in terms the president is left discretion as to the occasions upon which the authority may be properly exercised. See Fenwick, op. cit. p. 95.

ters in countries where the United States maintains consular courts may issue writs to prevent American citizens enlisting for service against any foreign country, and are authorized to use any military force of the United States available to carry this power into effect.[55] Collectors of customs are required to detain vessels "manifestly built for military purposes" leaving ports of the United States when circumstances render an unneutral use probable,[56] or, on order of the president, any vessel suspected of carrying arms or supplies to belligerent war vessels hovering outside of the port.[57]

Armed vessels owned in whole or in part by citizens of the United States, clearing out of ports of the United States, may be required to give bond that they will not be used by the owners themselves to commit hostilities.[58] This provision was designed to prevent the use of American owned privateers in war. There would be no breach of the bond if vessels were sold to a belligerent and used by him to commit hostilities.[59]

Federal courts are given "authority to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States."[60] This provision has been utilized to aid in the enforcement of neutrality obligations of prevention. In the case of United States vs. Quitman,[61] arising in 1854, Quitman refused to answer certain questions of a Grand Jury which was investigating alleged violations of neutrality in connection with the Cuban revolution. For this refu-

[55]Act, June 12, 1860, 12 stat. 77, Rev. Stat. 4090. Consular courts are given jurisdiction over United States citizens promoting "insurrection or rebellion against the government" of the country where the court is located, with power to decree the death penalty provided the United States minister approves. Rev. Stat. sec. 4102. Supra pp. 39, 74.

[56]Rev. Stat. 5290, Penal Code of 1910, sec. 17. This provision was suggested by Hamilton's "Instructions to the collectors of Customs of the United States" of Aug. 4, 1793. Am. St. Papers For. Rel., 1:40. The customs collector is liable for detention of vessels without probable cause, see Hendricks vs. Gonzales, 67 Fed. Rep. 351.

[57]Act March 4, 1915, 38 stat. 1226.

[58]Rev. Stat. sec. 5289, Penal Code of 1910, sec. 16.

[59]Because of the modern practice of converting merchantmen, although privateering is technically abolished, the provision is not obsolete. It seems probable, however, that it would be wise to extend its provisions to require bonding of vessels against sale to a belligerent, as this is now prohibited by international law. See Fenwick, op. cit. pp. 96, 154.

[60]Rev. Stat. sec. 727, Judicial Code, 1911, 36 stat. 1087, sec. 270.

[61]U. S. vs. Quitman, Fed. Cas. 16,111, (1854).

sal the court held that under this statute bonds should be required of him to observe the neutrality laws.

EXECUTIVE ACTION

In addition to the authority given to administrative, judicial and executive officers by statute, much authority exists inherently in such officers to enforce neutrality obligations. The opinion has been expressed that the president as chief executive may perform acts necessary to enforce treaties in the absence of statutory authority.[62] Such matters as preventing abuse of the privilege of asylum by belligerent warships, the passage of troops on neutral territory, and the unneutral use of radio-telegraph stations are prohibited by the Hague conventions as well as customary international law and may be enforced by executive action. Executive orders have provided for the supervision and censorship of radio-telegraph stations,[63] and the detention of vessels suspected of carrying supplies to belligerent warships,[64] on this basis. The shipping of submarines for sale to a belligerent power has also been prevented by executive action.[65] The executive disapproval of loans to belligerents, although not required by international law, is another illustration of inherent executive authority in these matters.[66]

Courts have held that jurisdiction of vessels fitted out in violation of neutrality, or prizes taken by them, is inherent in the admiralty and prize jurisdiction, and may be exercised in the absence of statute.[67] A large range of discretionary power to prevent unneutral use of territory or unneutral acts by American citizens undoubtedly exists in revenue officers, marshals and other civil officers of the United States.

[62]Ex Parte Toscano, 208 Fed. Rep. 938, (1913); See also In re Debs, 158 U. S. 564, (1895), on inherent power of executive and judicial officers to carry out the obligations and functions of government.

[63]Executive Order, Aug. 5, 1914, Supp. Am. Jour. Int. Law, 9;115, Jan., 1915.

[64]Circular of Dept. of Stat., Sept. 19, 1914, Supp. Am. Jour. Int. Law., 9;122, Jan., 1915.

[65]Letter by Secretary of State Bryan, Dec. 7, 1914, Am. Jour. Int. Law, 9;177, (Jan., 1915). Also Editorial Comment, J. B. Scott, Ibid., 9;177. See also circular of Dept. of State with reference to the status of armed merchant vessels, 1914, permitting detention of suspected vessels by port authorities. Supp. Am. Jour. Int. Law, 9;121, (Jan., 1915).

[66]See Editorial Comment, Am. Jour. Int. Law, 8;856 (1914).

[67]Glass vs. The Sloop Betsey, 3 Dall. 6, (1794); Talbot vs. Jansen, 3 Dall. 133, (1796); The Estrella, 11 Wheat, 298, (1819).

COMMERCIAL EMBARGOES

Another class of acts which relates somewhat to the enforcement of duties of prevention are the embargo acts passed at different times. The acts of 1898 and 1914 requiring an embargo on arms under certain conditions have already been mentioned. Of somewhat different character are commercial embargoes,[68] the most important of which were those passed during Jefferson's administration, while the United States was a neutral during the Napoleonic wars in Europe.

There is not and never was a rule of international law which requires a neutral state to prevent shipments of merchandise or of arms to a belligerent or to any one else. This is specifically stated in the Hague Conventions of 1907.[69] The self-made "international law" in the extraordinary Berlin and Milan decrees of Napoleon and the British order in council[70] forbade neutral commerce with practically all of Europe, and it might be inferred that the American Embargo of 1807 to 1809 was in aid of these decrees. It must be understood, however, that these decrees and orders did not assert that neutral states were under obligations to prevent their subjects engaging in such commerce. They simply asserted that the ordinary rule of self-help, by which belligerents can seize neutral vessels as prize, would be applicable to a much wider range of circumstances than permitted by the ordinary rules of blockade, contraband and unneutral service.

The embargo and non-intercourse acts are therefore to be regarded as rules of domestic policy, dictated by reasons entirely unrelated to international law. It was not to aid in the enforcement of its duties as a neutral either under international law or under the law asserted by Napoleon's decrees or the British orders in council that they were enacted. Their purpose was rather one of retaliation against these extensions of international

[68]Embargo acts, Mch. 26, 1794, 1 stat. 400; Apr. 2, 1794, 1 stat. 401; Apr. 18, 1794, 1 stat. 401; May 22, 1794, 1 stat. 396; June 4, 1794, 1 stat. 372; Dec. 22, 1807, 2 stat. 451; Jan. 9, 1808, 2 stat. 453; Mch. 12, 1808, 2 stat. 473; Apr. 25, 1808, 2 stat. 499; Jan. 9, 1809, 2 stat. 506, act of Dec. 22, 1807 repealed Mch. 1, 1809 and non-intercourse act in reference to France and England substituted. See Moore's Digest, 7:142-144.

[69]Hague conventions, 1907, v, art. 7, Malloy, p. 2298; xiii, art. 7, Malloy, p. 2359.

[70]For text of British Orders in Council and Napoleon's decrees, see Am. St. Pap., For. Rel., 3;262-286; British and Foreign State Papers, 8;401-513; De Martens, Nouveau Recueil, 1;433-549.

law. It is noteworthy that the enactment of the embargo by the United States permitted Napoleon to extend his view of international law even further by his Bayonne decree[71] ordering the seizure of all United States vessels at sea on the ground that he was simply helping the United States enforce its own law. This view was of course unwarranted. No domestic law of the United States could add to the belligerent rights of either party to the war.

INTEROCEANIC CANALS

The United States has recognized special obligations of prevention as encumbent upon it in relation to the Panama Canal, by treaty, and has provided for their enforcement by executive orders. In its treaties with New Granada, (now Colombia) of 1846,[72] and with Nicaragua of 1867,[73] the United States guaranteed the neutrality of any canal that might be constructed in either of these countries. In the Clayton-Bulwer treaty with Great Britain of 1850,[74] the two countries agreed jointly to guarantee the neutrality of any interoceanic canal in the central American region, but it was provided that neither should exercise exclusive control of such a canal. The Hay-Pauncefote treaty of 1901[75] superseded this treaty. Great Britain accorded the United States the right to construct and maintain a canal and to provide regulations for managing it. The United States agreed to adopt substantially the rules of the Suez canal convention to ensure its neutralization. Specific regulations require the United States to prevent, in the canal or adjacent waters to a three mile limit, blockades, the exercise of belligerent rights, hostile acts, the revictualing of belligerent vessels, the embarkation or disembarkation of troops or munitions of war except in case of accidental hindrance of transit. It must compel vessels to complete transit with the least possible delay and must enforce the twenty-four hour stay and twenty-four hour interval rules. To perform these duties the United States is authorized to use necessary military force.

In its treaty of 1903 with the Republic of Panama[76] the United States guaranteed that country's independence and was

[71] Bayonne Decree, Am. State Pap., For. Rel., 3;291.
[72] Treaty with Colombia, 1846, art. 35, Malloy, p. 312.
[73] Treaty with Nicaragua, 1867, art. 15, Malloy, p. 285.
[74] Treaty with Great Britain, 1850, Malloy, p. 660.
[75] Treaty with Great Britain, 1901, Malloy, p. 782.
[76] Treaty with Panama, 1903, art. 1, 18, 23, Malloy, p. 1349.

guaranteed complete sovereign rights in perpetuity over a strip of territory known as the Canal Zone, extending five miles either side of the canal route exclusive of the cities of Panama and Colon. The United States guaranteed the perpeutal neutrality of the canal and agreed to use armed force and if necessary erect fortifications in the canal zone for that purpose.

The canal was completed in 1914 and regulations for its operation and navigation were promulgated by executive order July 9, 1914.[77] Following the outbreak of European war in August, 1914, the president promulgated supplementary rules under date of Nov. 13, 1914,[78] designed to carry out treaty requirements for preventing unneutral acts in the canal. The regulations were based on the Hay-Pauncefote and Panama treaties, the Suez Canal convention of Oct. 29, 1888,[79] the rule issued thereunder on Feb. 10, 1904[80] following the outbreak of the Russo-Japanese war, and the general requirements of neutrals as defined in the Hague conventions.[81] These rules defined public armed vessels and auxiliary belligerent vessels, for both of which classes it prescribed the rules required by the treaties mentioned. The enforcement of these regulations was ensured by requiring vessels to give written assurances to obey them before entering the canal. In addition to the treaty requirements the regulations forbade the presence of more than six war vessels of one belligerent or its allies in the canal or adjacent waters at a time, and the passage of air craft over the Canal Zone. A protocol was concluded with the Republic of Panama in October, 1914,[82] to ensure the cooperation of that republic in carrying out the neutrality requirements that a war vessel be prevented recoaling in the same country within a period of three months. For the purpose of this requirement, the Republic of Panama and the Canal Zone were considered the same country.

[77]Rules and Regulations for the operation and navigation of the Panama Canal, July 9, 1914.

[78]Proclamation prescribing rules and regulations for the use of the Panama Canal by belligerent vessels, Nov. 13, 1914. For text see Supp. Am. Jour. Int. Law., 9;126, Jan. 1915. See also editorial comment in Am. Jour. Int. Law., 9;167, Jan. 1915.

[79]Convention of Constantinople, Oct. 28, 1888, Martens, Nouveau Recueil, ser. II; 15;557; British and Foreign State Papers, 78;18.

[80]Rules for the use of the Suez Canal by belligerent vessels, Feb. 10, 1904, British and Foreign State Papers, 102;591.

[81]Hague conventions, 1907, xiii, Malloy, p. 2352.

[82]Protocol with Panama, 1914, Supp. Am. Jour. Int. Law., 9;128, Jan. 1915.

It will be seen that the duties of prevention undertaken in these regulations are largely the same as those required of all neutral territory. The requirements are, however, stricter in some cases, as the rights of fueling, repairing, and replenishing stores are more limited. The regulation interprets the twenty-four hour stay rule as permitting a twenty-four hour stay in addition to the time occupied in transit of the canal.

The regulations seem to have adequately covered the duties specifically undertaken by the United States in reference to the Canal, as well as the duties encumbent upon it for preserving the neutrality of all its territory.

ACTS BY AGENCIES OF GOVERNMENT

Aside from the duties of prevention incumbent upon the United States in reference to its civil population, international law and treaty require it to prevent unneutral acts by public officers. On the outbreak of wars, special instructions have been generally sent to diplomatic officers, often relating especially to duties imposed upon such officers in belligerent countries in case affairs of the other belligerent are entrusted to them. On the outbreak of the Russo-Japanese war in 1904 an executive order directed "all officials of the government, civil, military and naval—not only to observe the President's proclamation of neutrality but also to abstain from either action or speech which can legitimately cause irritation to either of the combatants.[83]"

The Navy regulations enjoin naval officers to observe strict neutrality on all occasions.[84] These regulations can be enforced by court martial, a procedure resorted to in the case of an unneutral act by a naval commander in 1844 during the war between Montevideo and Buenos Ayres.[85]

The obligations of prevention incumbent upon neutral states have been recognized by the United States in treaties and statutes, and the duties thus recognized seem to be in accord with international law. The failure of statutes to recognize the duty to prevent sales of armed vessels to belligerents is only an apparent exception, as the United States has acceded to this principle in the Treaty of Washington and the Hague conventions of 1907,

[83]Executive Order, March 10, 1904, For. Rel., 1904, p. 185, Moore's Digest, 7;868. See also instructions to diplomatic and consular officers, Aug. 17, 1914, Supp. Am. Jour. Int. Law, 9;118, (Jan., 1915).

[84]Navy Regulations, 1913, sec. 1502, 1633-1624, 1645, 1647.

[85]Moore's Digest, 1;178.

which are according to the constitution a part of the law of the land.

The means relied on for enforcing these duties are (1) the deterrent effect of criminal punishment by fines and imprisonment, (2) the forfeiture of property involved in violations of neutrality, (3) the requirement of bonds of good behavior in suspicious cases, (4) the grant of jurisdiction to courts over cases involving breaches of neutrality, with implied power to enforce their judgments, (5) direct executive action to enforce criminal provisions, expel or detain foreign vessels, and otherwise prevent illegal acts, with a resort to the army, navy, and militia of the United States if necessary, (6) control of public officers by executive action and by courts martial.

While specific provision is made by statute for the use of these means in many cases, it seems probable that where such authority is not given by statute, executive and judicial officers can apply appropriate means for enforcing the duties specified by treaty or the Hague conventions. Treaties are part of the law of the land, and the executive and judiciary, being under oath to enforce the laws, can, it would seem, use all available means to enforce them.

In the field of international law defining neutral duties the United States holds an honored position. Its early neutrality statutes enforcing obligations in this field laid down a standard of conduct which was not required by international law at that time but has since become recognized as obligatory. The neutrality act of 1794 was influential in creating new international law. Canning said of American practice in this respect, "If I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson."[86] This unique position

[86]Cited, Syngman Rhee, Neutrality as influenced by the United States, Princeton, 1912, p. 106. See also opinion of J. W. Foster, and of Rhee, Ibid., pp. 104,111. W. E. Hall, not inclined to flatter the United States, says of its practice in reference to neutrality obligations, "The policy of the United States in 1793 constituted an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinion as to what these obligations were, and in some points it even went farther than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now admitted by the community of nations." W. E. Hall, A Treatise on International Law, 4th ed., London, 1895, p. 616.

is undoubtedly due in large measure to the situation of the United States as the most important power of European civilization remaining neutral in various European wars. It indicates, however, the effect which municipal law may have in creating new international law.

CHAPTER IX. OBLIGATIONS OF VINDICATION.

INTRODUCTORY

Duties of vindication are necessitated by the failure of belligerent troops, warships or prize crews to observe their obligations as belligerents toward neutrals, and some of them also imply a failure on the part of the neutral state to perform its duties of prevention. Thus a neutral state is bound to prevent hostilities in its land or water territory, but if it fails in this it must perform its duty of vindication by interning troops, or restoring prizes captured in the course of such hostilities.

Most of the obligations of this kind are specified in the Hague conventions, and consist of measures to be taken by the neutral state in case of violations of its territory by land forces, hostilities in its territorial waters by naval forces or violations of the right of asylum by belligerent warships or their prizes.

There are a number of general requirements laid down for belligerent warships which a neutral is at liberty to modify by law. Thus a neutral state is permitted to vary the general rule demanding that all belligerent vessels be equally permitted to enter its ports, by forbidding such entrance to vessels which have violated its neutrality.[1] It may also vary the twenty-four hour stay rule by municipal regulations,[2] and the general rule permitting no more than three belligerent warships in a port at one time.[3] The conventions also give a neutral power the right to grant asylum to belligerent prizes on condition that it sequestrate them, pending adjudication, but this provision was not ratified by the United States,[4]

[1]Hague Conventions, 1907, xiii, art. 9, Malloy, p. 2352.

[2]Ibid., xiii, arts. 12-14, 19.

[3]Ibid., xiii, art. 15.

[4]Ibid., xiii, art. 23. This permission was a variation from the general rule laid down in articles 21 and 22 which forbade the giving of asylum to prizes except in cases of "unseaworthiness, stress of weather, or want of fuel or provisions," and even then only temporarily. The United States ratified the convention with a proviso excluding article 23, thereby recognizing it as neutral duty to refuse to permit prizes to be sequestrated in her ports. See Naval War College, International Law Situations, 1908, p. 76. It is interesting to note that the United States had specifically permitted the sequestration of prizes in a number of its early treaties. See

International law in these cases imposes a belligerent duty but no corresponding neutral duty of vindication. The belligerent duty is for the benefit of the neutral and if the neutral indicates by local law that it does not care to avail itself of this benefit international law is unconcerned. These subjects therefore do not form obligations of vindication; they are rather exceptions to those obligations.

Eliminating these exceptions, the duties of vindication recognized by the United States by treaty may be classified as (1) the internment of belligerent troops violating neutral territory,[5] (2) the internment of belligerent warships violating the law of asylum,[6] (3) the expulsion of belligerent warships after a twenty-four hour stay, subject to exceptions,[7] (4) the detention of belligerent warships in accordance with the twenty-four hour interval rule,[8] (5) the restoration of prizes captured in neutral waters or brought into neutral ports in violation of the law of asylum, and the internment of the prize crew.[9] These are positive duties imposed upon the neutral state, and failure to perform them will furnish grounds for diplomatic complaint and demand for reparation by the injured belligerent.

The performance of these duties involves an assertion of jurisdiction over foreign prizes, warships or armed forces, agencies which under ordinary circumstances are exempt from the jurisdiction of any sovereign but their own. It is therefore of importance to investigate the measures which the United States has taken for performing its duties of vindication by the exercise of this extraordinary jurisdiction. The subject may be conveniently divided into the three parts, (1) illegal prizes, (2) illegal

treaties with France, 1778-1789, art. 17, p. 474; 1800-1809, art. 24, p. 504; Netherlands, 1782-1795, art. 5, p. 1245; Sweden, 1783-1799, revived 1816, 1827, art. 19, p. 1732; Prussia, 1785-1796, art. 19, 21, p. 1493; Great Britain, 1794-1807, art. 25, p. 604. Treaties with Tripoli, 1805, art. 17, p. 1792 and with Algiers, 1795-1815, art. 10, p. 3; 1815-1830, art. 18, p. 10, permitted United States vessels to sequestrate and sell prizes in their ports and forbade the sale of prizes taken by any of the Barbary states from the United States in a similar manner. Asylum to merchant vessels and in most cases to warships and privateers also when necessitated through "stress of weather or pursuit of pirates or enemies" is provided for in treaties with twenty-five countries, a few of which are still in force.

[5]Hague Conventions, 1907, v, arts. 11-12, Malloy, p. 2300.

[6]Ibid., xiii, arts. 21, 24.

[7]Ibid., xiii, arts. 12, 13.

[8]Ibid., xiii, art. 8.

[9]Ibid., xiii, arts. 3, 21, 24.

acts of belligerent warships, (3) violations of land territory. The mere fact that these duties are contained in the Hague conventions, which are treaties and "the law of the land" would furnish ground for the assertion of jurisdiction by judicial and executive officers, but in some cases jurisdiction has been specifically conferred by statute, and in others it is necessary to consider the view which the courts and executive authorities have taken as cases have arisen. We will therefore consider the supplementary laws enacted for carrying out these obligations, and the rules laid down by the executive and judicial officers themselves in carrying them out.

Illegal Prizes.

The neutrality laws give the United States district courts a jurisdiction over captures made in the territorial waters of the country,[10] and imply that a jurisdiction exists over prizes taken by privateers outfitted in the United States.[11] This provision contained in the original neutrality act of 1794[12] was enacted as a result of Washington's address to congress of Dec. 31, 1793,[13] in which he urged upon congress the enactment of neutrality acts, and also provisions ensuring a sufficient jurisdiction in the courts to carry out the duties of restoring illegal prizes. It seems probable that United States courts can assume jurisdiction over illegal prizes under their general admiralty and prize jurisdiction even in the absence of statute, as was in fact done in the cases of Glass vs. The Betsey[14] and Talbot vs. Jansen,[15] both of which came before the court before the passage of the first neutrality act. The view was emphatically stated in the case of the Estrella[16] that the jurisdiction existed independently of statute. Furthermore, so far as the writer has been able to discover, there has never been a case before the court in which the capture was made in the territorial waters of the United States, and in which

[10]Rev. Stat. Sec. 5287, Penal Code of 1910, sec. 14.

[11]Rev. Stat. Sec. 5287, Penal Code of 1910, sec. 14, gives the President power to utilize the military forces of the country to "detain such ship or vessel (violating the neutrality of the United States) with her prize or prizes—in order to restore the prize or prizes in the cases to which restoration shall be adjudged."

[12]Act. June 5, 1794, 1 stat. 381.

[13]See Am. St. Pap., For. Rel., 1;31.

[14]Glass vs. The Sloop Betsey, 3 Dall. 6, (1794).

[15]Talbot vs. Jansen, 3 Dall. 133.

[16]The Estrella, 4 Wheat. 298, (1819).

therefore the jurisdiction explicitly conferred by statute would strictly apply. In all the cases the illegality of the prize has been based on an outfitting of the privateer, or augmenting of its forces, in the United States, prior to the capture. We may therefore safely assert that the jurisdiction exercised by United States courts while the country is neutral, over belligerent prizes, is not dependent on statute.

The nature of the prize jurisdiction while the country is neutral has been discussed at length in a number of cases and with a remarkable concurrence of opinion. The court has always insisted that its jurisdiction does not extend over the question of prize or not prize.[17] This is a matter solely within the authority of the prize courts of the belligerent country, and their determination is conclusive. The neutral's jurisdiction over prizes of war can only arise where (1) its own duty of vindicating its neutrality is involved, (2) where the capture was entirely without evidence of belligerent authorization or for other reason not within the belligerent's prize jurisdiction,[18] or (3) where sal-

[17]L'Invincible, 1 Wheat. 238, 261; McDonough vs. Dannery and the Ship Mary Ford, 3 Dall. 188; The Alerta, 9 Cranch, 359, (1815); The Estrella, 4 Wheat. 298.

[18]This situation occurs where the capture was so clearly unwarranted that the belligerent prize court can not legitimately assert a jurisdiction. There is of course room for difference of opinion in any case as to whether it could or could not, and the question virtually resolves itself into this: Is the belligerent prize court's assertion of its own jurisdiction to be considered conclusive? In Glass vs. The Sloop Betsey, (3 Dall. 6, 1794) the supreme court upheld jurisdiction over a capture by a French privateer, apparently on the sole ground that being neutrally owned the vessel was not liable to condemnation in a French Prize court. It is doubtful whether such a jurisdiction would now be maintained. In Rose vs. Himely, (4 Cranch 241, 1808) the prize, owned by an American, Rose, was seized on the high seas near Cuba for breach of municipal regulations and after sale to Himely brought to Charleston. Here it was libeled by the original owner, Rose, and while in the custody of the United States District court, a French Prize court in Santa Domingo issued a decree of condemnation upon which Himely based his title. The majority of the court though disagreeing in reasons agreed that the Santa Domingo court lacked jurisdiction and consequently Himely had no title. Three justices denied its jurisdiction on the ground that actual custody of the prize was necessary. Two justices, including Chief Justice Marshall, held that captures on the high seas for breach of municipal regulations were contrary to international law and so conferred no jurisdiction upon the prize court of the capturing country. Justice Johnson dissented from the decision,

vage or other maritime claims of neutral subjects are involved.[19] In all of these cases the prize must have been brought within the neutral's jurisdiction voluntarily. A neutral state has no right to make seizures outside of its own territory[20] or to assume juris-

holding that the prize court's jurisdiction depended upon municipal and not international law and that its own assertion of jurisdiction must be regarded as conclusive by foreign courts; hence the Santa Domingo court had jurisdiction and Himely's title was good. The case does not refer to prize jurisdiction in pursuance of belligerent rights, but the principle that there are limits, beyond which a foreign prize court's assertion of its own jurisdiction will not be regarded as conclusive, although denied by Justice Johnson, seems to have been settled. Consequently there are cases in which the courts of a neutral state may exercise jurisdiction over a prize which the belligerent claims the right to adjudicate, and thereby itself determine upon the belligerent's rights.

[19]This situation occurs when the determination of belligerent prize rights arises incidentally to some ordinary maritime claim of a neutral subject. In McDonough vs. Dannery and the Ship Mary Ford, (3 Dall. 188,1795) a French squadron had captured the Mary Ford, a British vessel, and after attempting to sink her, left her derelict. She was rescued by a United States vessel which brought her to Boston and libeled her for salvage. Both French and British claimants put in an appearance, the French claiming the balance after deduction of salvage, as legal prize of war, and the British claiming this balance as original owners of the vessel. The supreme court decreed one-third salvage to the United States rescuers, and the balance to the French captors, holding that title to an enemy vessel changed hands immediately on capture. Here the court really decided a question of prize as between the two belligerents, but it was only done incidentally to the adjudication of the neutral parties' claims to salvage, and could be regarded, as was said in discussing the case by Justice Johnson in L'Invincible, (1 Wheat. 238, 261) to have been a recognition of the title of the last possessor rather than a determination of belligerent rights. In the Invincible the court again assumed jurisdiction, where neutral salvage rights were involved, and in DelCol vs. Arnold, (3 Dall. 333), jurisdiction over a prize sequestrated in Charleston was based on a maritime tort committed against a neutral owned vessel by the belligerent claimant of this prize. The case was questioned in L'Invincible, but justified on the ground that consent had been given by the belligerent claimant to submit the proceeds of his prize to the neutral jurisdiction.

[20]This statement was denied by Chief Justice Marshall in Church vs. Hubbart, 2 Cranch 187, (1804), Scott, 343; He upheld a seizure by Brazil outside of territorial waters in pursuance of a local law. The view stated was however maintained by Marshall in Rose vs. Himely, 4 Cranch 281, (1808); See also Hudson vs. Guestier, 6 Cranch 281, (1810); The Appollon, 9 Wheat. 362. In the case of the Itata submitted to arbitration, the

diction over vessels which are not within the actual custody of its court.[21]

The first situation mentioned is the one of immediate importance to the present subject. In the case of the Brig Alerta,[22] Justice Washington clearly defined the nature of this jurisdiction. "The general rule is undeniable that the trial of captures made on the high seas, jure belli, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought or by a privateer which had been illegally equipped in such country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their own neutrality."

The two cases are distinguished by Justice Washington, (1) where the capture is made in the territorial waters of the United States, and (2) where the capture is made by a vessel which was armed or had its forces augmented in the United States in violation of neutrality.

(1) In the first case jurisdiction is specifically granted by statute[23] but has never been exercised. In the case of the Grange,[24] Attorney General Randolph gave an official opinion that a vessel captured by a belligerent in Delaware bay, which he regarded as territorial water, should be restored to the United States, but as the vessel was no longer infra praesidia, no question of a federal court's prize jurisdiction arose. In several cases where the United States has been belligerent, the neutral state's right to prizes captured in its territorial waters has been upheld[25] but apparently the courts have never had a direct

United States was held liable in damages for the seizure of a vessel in Chilean territorial waters. See Moore, Digest of International Arbitrations, 3;3067-3071.

[21]Rose vs. Himely, 4 Cranch 241, (1808).

[22]The Alerta, 9 Cranch, 359, 364, (1815).

[23]Revised Statutes, Sec. 5287. Penal Code of 1910, sec. 14.

[24]The Grange, 1 op. 33, (1793). On request this vessel was returned by the capturing belligerent power. Moore's Digest, 7;1086.

[25]The Anne, 3 Wheat. 435, (1818); The Florida, 101 U. S. 37, (1879); The Sir Wm. Peel, 5 Wall. 517; The Adela, 6 Wall. 266. In Stewart vs. United States, 1 Ct. Cl. 113, (1864), the court asserted that the United

opportunity to assert jurisdiction over such a prize while the country was neutral.

(2) In the case of prizes captured by vessels which previously had violated the United States neutrality laws, the exercise of jurisdiction by courts is implied in the neutrality statutes,[26] and has been frequently exercised. During the wars immediately following the French revolution, American adventurers, moved by republican sympathy for revolutionary France and possibly fully as much by hopes of gain, frequently fitted out privateers in American ports, obtained French Letters of Marque and forthwith cruised against England, with whom France was at war. It often happened that prizes made by these vessels would be brought into American ports in accordance with the right claimed by France under the treaty of 1778;[27] in which case a representative of the original neutral or English owner, generally the English consul, would file a libel for restitution. The court from the first assumed prize jurisdiction in such cases,[28] and in several cases restored the vessel.[29] A similar situation arose during the revolutionary struggles of the South American republics against Spain and Portugal. Again thoughts of pecuniary gain and republican sympathy combined

States had a just claim against Portugal for permitting a prize to be recaptured by Great Britain in her territorial waters during the war of 1812, and that Portugal had a just claim against Great Britain for performing this act. Indemnity had been obtained from Portugal for some of these seizures by the treaty of 1851. See Malloy treaties, p. 1458, and also General Armstrong Arbitration, Moore, Int. Arb., 2;1071. Commodore Stewart's claims having been ignored in this settlement, it was held he had no claim against the United States. Supra, p. 107.

[26]Revised Statutes, sec. 5287, Penal Code of 1910, sec. 14. Supra. p. 131, note 11.

[27]Treaty with France, 1778-1798, art. 17,22, Malloy treaties, p. 474.

[28]Talbot vs. Jansen, 3 Dall. 133, (1796); Moodie vs. The Alfred, 3 Dall. 307, (1796); Moodie vs. The Phoebe Ann, 3 Dall. 319, (1796); Geyer vs. Michel and the Ship Den Onzekeron, 3 Dall. 285; Moodie vs. The Betty Carthcart, Fed. Cas. 9,742, 3 Dall. 288, note; Wilkinson vs. The Betsey, Fed. Cas. 17,750, (1799); Moodie vs. The Brothers, Fed. Cas. 9,743, (1799); British Consul vs. The Nancy, Fed. Cas. 1898, (1799); Moodie vs. The Amity, Fed. Cas. 9741.

[29]Restoration was decreed to a neutral Dutch claimant in Talbot vs. Jansen, 3 Dall. 133, (1796), and to an English claimant in Moodie vs. The Betty Carthcart, Fed. Cas. 9,742, 3 Dall. 288, note, and British Consul vs. The Nancy, Fed. Cas. 1898, (1799).

to lure American privateers into the fray, and frequent cases appear in the reports with the Spanish or Portuguese consul as libellant. Again the United States courts asserted jurisdiction and as before they generally decreed restitution to the original owner.[80] The effrontery with which these privateers sometimes put forth their claims was astonishing. On several occasions the expeditions appear to have been nothing short of piracy, as captures were made before any commission was obtained from the South American insurgents. Under such circumstances the owner of the privateer would put forth a claim of expatriation[81] or of a sale of the privateer to a fictitious South American party,[82] claims which were for the most part ignored by the court.[83]

[80]Restitution was denied in La Amistad de Rues, 5 Wheat. 385, (1820); the case was remanded for further evidence in The Divina Pastora, 4 Wheat. 52, (1814) and in the following cases restitution was decreed: The Brig Alerta vs. Moran, 9 Cranch, 359, (1815) The Estrella, 4 Wheat. 298, (1819); La Conception, 6 Wheat. 235, (1821) The Bello Corrunes, 6 Wheat. 152, (1821); The Santissima Trinidad, 7 Wheat. 285, (1827); The Gran Para, 7 Wheat. 471, (1822); The Arrogante Barcelones, 7 Wheat. 496, (1822); The Santa Maria, 7 Wheat. 490; The Monte Allegre, 7 Wheat. 520, (1822); The Nereyda, 8 Wheat. 108, (1823); The Fanny, 9 Wheat. 659, (1824).

[81]The Gran Para, 7 Wheat. 471, (1822).

[82]LaNereyda, 8 Wheat. 108, (1823); The Monte Allegre, 7 Wheat. 520, (1822).

[83]In some dicta in cases of this character the court expressed the opinion that a bone fide transfer of the prize to an innocent third party destroyed the taint of illegality, (The Arrogante Barcelona, 7 Wheat. 496, 1822) but where such a case arose restitution of the prize was decreed (The Fanny, 9 Wheat. 658, 1824). A bona fide sale of the privateer after the illegal outfit in the United States was held to remove the taint of illegality from subsequent captures but such sale must be clearly proved (The Monte Allegre, 7 Wheat. 520, 1822; Moodie vs. The Alfred, 3 Dall. 307, 1796). It was held that making of repairs with augmentation of force did not amount to a breach of neutrality and consequently did not make prizes illegal (Moodie vs. The Phoebe Ann, 3 Dall. 319, 1795; Geyer vs. Michel and the Ship Den Onzekeran, 3 Dall. 285). A sale in the United States of prizes captured under a French commission, being impliedly permitted by the French treaty of 1778, (art. 17, 22, Malloy, p. 474) was held to be no breach of neutrality and hence did not make the prize illegal, (Moodie vs. The Amity, Fed. Cas., 9741). The United States never admitted that France had an absolute right of sequestrating and selling prizes in the United States under this treaty (Moore's Digest, 7;936). Such sales are now forbidden by international law (Hague Conventions, 1907, XIII, art.

It appears that the law of the United States permits of courts exercising jurisdiction over illegal prizes and disposing of them in a manner to fulfill the state's neutral obligation of vindication. It must be noted that the exercise of this jurisdiction implies custody of the prize. If the prize is in a foreign port the United States courts have no jurisdiction, although the case may be such that the government of the United States is under an obligation to demand its return.[34]

ILLEGAL ACTS BY BELLIGERENT WARSHIPS.

The duty of vindication following an illegal act by a belligerent warship may involve the exercise of jurisdiction, (1) over the officers and crew of the vessel or (2) over the vessel itself. Formerly a distinction was drawn between cases involving public warships and those involving privateers. As privateering is now technically abolished this distinction is no longer important, and even before its abolition the courts declared that for most legal purposes privateers, bearing a commission of the sovereign, were in the same status as public warships.[35]

(1) It was held in an opinion of Attorney General Nelson in 1844[36] that, although belligerent public vessels themselves are not subject to the jurisdiction of United States courts, their commander and officers are and can be criminally prosecuted for breaches of the neutrality statutes. He said, "the very purpose of the act would be defeated were it otherwise; and there is no principle of which I am aware which exempts from responsibility for criminal acts within our jurisdiction the commander or officers of ships of war of other nations with whom we are at peace." While there seem to be no cases in which prosecution of the officers of men of war has been under-

21, Malloy, p. 2361; Moore's Digest, 7;935-938). In any case a bone fide condemnation in a recognized court was held to transfer title conclusively, in the prize, but the condemnation must be satisfactorily evidenced (La Nereyda, 8 Wheat. 108, 1823). Where none of these circumstances intervened, restitution to the original owner was decreed, but claims for further damages by the injured owner of the prize were denied (LaAmistad de Rues, 5 Wheat. 385). Supra p. 108, note 7.

[34]See Hague Conventions, 1907, xiii, art. 3, Malloy, p. 2359 and United States understanding of it, Senate Resolution of Apr. 17, 1908, Malloy, p. 2366.

[35]L'Invincible, 1 Wheat. 238, (1816).

[36]Nelson, Att. Gen., 4 op. 336, (1844).

taken, the commanders of privateers holding commissions of foreign belligerent states have been prosecuted when it could be proved that they were still American citizens as is necessary for prosecution under the first section of the neutrality act.[37] If a privateer is to be regarded as subject to the same legal exemption as a man of war it would seem that these cases are in accord with Attorney General Nelson's opinion. Prosecution has never been attempted of commanders of privateers under sections of the neutrality acts which are not directed against citizens alone, as for instance section five,[38] which prohibits the augmentation of force of warships or privateers in the territory of the United States by any person. A very similar case arose in the criminal prosecution of Alexander McLeod by the State of New York in 1841.[39] He was a soldier acting under authority of Great Britain, but nevertheless New York maintained its jurisdiction to punish him criminally for a homicide committed in that capacity, in the State.

At present international law seems to exempt the officers and crew of public vessels from local jurisdiction so long as their acts are in pursuance of official business or take place entirely within the vessel.[40] This exemption, however, does not extend to acts done on land in violation of local laws, and if the commander of a warship is engaged in augmenting the force of his vessel by the purchase of military materials or the recruitment of men in the territory of the United States and outside of his vessel, it seems probable that he would be liable to the criminal provisions of the neutrality act, although in such a case undoubtedly diplomatic protest would be resorted to rather than criminal prosecution.

The criminal prosecution of the officers of warships is not itself a duty of vindication. Internment of such officers in certain cases is the action required of neutral states. It would seem that executive authorities can exercise jurisdiction over foreign naval forces to perform the duties required by treaties. The internment of land forces has been upheld in the courts[41] and it is probable that the same action as to naval forces is permitted by the law of the United States.

[37]U. S. vs. Isaac Williams, Fed. Cas. 17,708, 2 Cranch 82; note: In re Henfield, Fed. Cas. 6360, (1793).

[38]Revised Statutes, 5285, Penal Code of 1910, sec. 12.

[39]People vs. McLeod, (N. Y.) 25 Wend. 483, 1 Hill 375, (1841).

[40]See Moore's Digest, 2; sec. 256.

[41]Ex Parte Toscano, 208 Fed. Rep. 938, (1913).

(2) Whether United States courts can exercise jurisdiction over foreign public vessels which have violated the neutrality of the United States is a question of difficulty. It has been noted that courts can exercise jurisdiction over the prizes captured by belligerent privateers or cruisers in certain cases. The exercise of jurisdiction over the privateer or warship itself is an entirely different question. In the neutrality statutes forfeiture of privateers fitted out in the United States for unneutral purposes is provided for,[42] but this may be intended to refer to cases where the vessel was apprehended before being commissioned by the foreign power, and so does not necessarily imply a grant of jurisdiction over foreign public vessels. It has however been interpreted so to apply. In the case of the Cassius,[43] which was a French public vessel originally fitted out in the United States in violation of the neutrality laws, the vessel was held for a long time pending litigation and ultimately released on a technicality. France had protested at the exercise of jurisdiction over this vessel and finally abandoned it with the intention of protesting the matter diplomatically. Secretary of War Pickering in referring to this case upheld the court's jurisdiction,[44] for he thought if forfeiture could not be had in such cases the neutrality acts could be completely evaded by transferring illegally fitted out vessels to the foreign government at their first port. The exemption of foreign warships from local jurisdiction was denied by Attorney General Bradford in an opinion of 1794[45] in which he supported the execution of writs of habeas corpus on a British public vessel in an American port, for the purpose of releasing American citizens held on board. This action gave rise to a protest by the British minister.

The better opinion however seems to be that expressed by Chief Justice Marshall in the Schooner Exchange vs. Mc-Faddon,[46] in which case the court refused juridiction of a French public vessel which had entered port in stress of weather and which was claimed by a United States citizen as having been

[42]Revised Statutes, sec. 5283, Penal Code of 1910, sec. 11.

[43]Ketland vs. The Cassius, 2 Dall. 365. See also U. S. vs. Peters, 3 Dall. 121, which was an earlier case involving this vessel, in which the court's jurisdiction was denied.

[44]Letter of Sec. of State Pinckney, Oct. 1, 1795, Am. St. Pap., For. Rel., 1:634.

[45]Bradford, Att. Gen., 1 op. 47, (1794).

[46]The Schooner Exchange vs. McFaddon, 7 Cranch, 116, (1812).

illegally made prize by the French. The court held that while the principle of territorial sovereignty was absolute, comity and custom demanded that public vessels be excepted from the general rule, and the court would infer that the government intended to observe the customary rule of comity unless it had expressly declared the contrary. The exemption of foreign public vessels from jurisdiction was emphatically maintained by Attorney General Cushing in 1855[47] the theory of extra-territoriality being asserted. As has been noted Attorney General Nelson, while maintaining that the officers of public vessels were subject to the territorial jurisdiction, admitted that the vessels themselves were exempt.[48] This appears to be the rule and therefore, although United States courts can assume jurisdiction over illegal prizes, they cannot over foreign public vessels even when they have violated a duty of international law.[49]

Although courts cannot exercise jurisdiction over foreign public vessels violating neutrality, it is clear that executive officers must do so, if the duties of vindication are to be carried out. If a court exercised jurisdiction it would have authority to declare the vessel forfeited and thus change its ownership. Executive officers can exercise no such authority as this, but they can expel or detain a public vessel, render it incapable of putting to sea and intern its crew when occasion demands. The power to expel[50] public vessels is specifically given in the neutrality laws to the president, and in the execution of this power he may use the land and naval force and the militia of the country, if necessary. The power to detain vessels violating neutrality statutes is given to the president[51] and also to custom officers[52] when circumstances render an unneutral use probable. This does not apply to belligerent war vessels in general. It has been held that the president's power can only be used in aid of judicial process, and only military, not civil, officers can be employed.[53] A customs officer detaining a vessel

[47]The Sitka, 7 op. 123, (1855) Att. Gen. Cushing. See also 8 op. 73.

[48]Nelson, Att. Gen., 4 op. 336, (1844).

[49]For discussion of the exemption of public vessels from territorial jurisdiction see Hall, International Law, p. 195.

[50]Rev. Stat. 5288, Penal Code of 1910, sec. 15.

[51]Rev. Stat. 5287, Penal Code of 1910, sec. 14.

[52]Rev. Stat. 5290, Penal Code of 1910, sec. 17.

[53]Gelston vs. Hoyt, 3 Wheat. 246; See also 4 op. 336, (1844), somewhat modified in 21 op. 273.

under this provision does so at his own risk.[54] On account of these interpretations the statutory provisions seem insufficient to carry out the country's duties of vindication. However, as duties specified in treaties and conventions can probably be exercised by the president in the absence of express statutory authority,[55] the omission is not serious.

VIOLATIONS OF LAND TERRITORY.

The principal duty of vindication required under this head is the internment of belligerent troops entering neutral territory. Although not acted upon by New York in the case of People vs. McLeod,[56] the general principle that military forces are exempt from territorial jurisdiction is recognized in the United States. The doctrine was stated in reference to troops passing through territory under a license, in dicta by Chief Justice Marshall in The Exchange vs. McFaddon,[57] and in reference to the rights of troops engaged in hostilities in several cases arising out of the civil war.[58] This does not, however, prevent executive officers performing duties imposed upon the country by treaty. In the case of Ex Parte Toscano,[59] which came before a United States circuit court in 1913, the facts were as follows: During the civil war in Mexico a band of federalist troops defeated at Novco crossed the frontiers of the United States and voluntarily surrendered to armed forces of the United States. Under order of the president they were disarmed, kept for a time at El Paso and then sent to Ft. Rosecrans, California. Toscano, one of the interned soldiers, sought release on habeas corpus, on the ground that he was unconstitutionally deprived of liberty without "due process of law". This the court denied, holding that the exercise of the authority by the president was fully justified by the Hague convention of 1907,[60] which had been ratified by both the United States and Mexico. "The treaty," it said, "is full and complete and no legislation is necessary to its enforcement." If congress has not provided special officers for carrying it out

[54]Hendricks vs. Gonzalez, 67 Fed. Rep. 351.

[55]Ex Parte Toscano, 208 Fed. Rep. 938, (1913).

[56]People vs. McLeod, (N. Y.) 25 Wend. 483; 1 Hill 375, (1841).

[57]The Schooner Exchange vs. McFaddon, 7 Cranch 116, (1812).

[58]Neal Dow vs. Johnson, 100 U. S. 158, 170, (1879); Coleman vs. Tennessee, 97 U. S. 509, (1878).

[59]Ex Parte Toscano, 208 Fed. Rep. 938, (1913).

[60]Hague Conventions, 1907, v, art. 11, Malloy, p. 2298.

the duty devolves upon the president as chief executive. The Hague treaty itself and the execution of its terms were held to be sufficient to give the applicant his "due process of law", and the writ was denied. From this case it seems that United States law adequately provides for performing this duty of vindication.

The United States has provided for carrying out its duties of vindication (1) by conferring jurisdiction on the federal courts of illegal prizes, with power to restore and liberate such prizes according to international law, and (2) by conferring authority on executive officers to expel, detain and intern war vessels and their officers and crews and to intern belligerent troops crossing the frontier. The degree to which the international duties of vindication are performed depends upon the rules of law acted upon by courts and executive officers in exercising their jurisdiction in these matters. The rules followed by courts are found in court decisions, and are based on the principle that courts of the United States apply international law as part of the law of the United States, while executive officers are bound by the principle that treaties are the law of the land and so perform the duties of vindication as therein specified. With these principles it seems that adequate provision is made in the law of the United States for carrying out the duties of vindication imposed by international law.

PART III. OBLIGATIONS AS A BELLIGERENT TOWARD NEUTRALS

CHAPTER X. INTRODUCTORY.

The obligations of neutral to belligerent states have been classified under the five heads, duties of (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5) reparation. In order to show the relation of belligerent duties to neutral duties we will consider belligerent duties under the same classification.

It must, however, be constantly borne in mind that the position of a belligerent is very different from that of a neutral. A belligerent is always active, while a neutral is passive. Consequently, while it is neutral duties that are prominent, it is belligerent rights which are most noticed. Neutral duties are restrictions upon the ordinary rights of an independent state, while belligerent duties are simply limits set to extraordinary rights.

(1) The belligerent's duties of abstention are largely equivalent in substance to a neutral state's duties of prevention. What the neutral is bound to prevent, the belligerent, in most cases, though not always, is bound to abstain from. Thus a belligerent state is bound to abstain from violations of neutral territory and injury to neutral individuals. These duties so far as encumbent upon the state as such are beyond the province of municipal law to control and so beyond the scope of our subject. When a belligerent neglects its duties of abstention, as Germany did in the violation of Belgian neutrality, it is an act of sovereignty for which the state is internationally responsible but which can not be controlled by municipal law. Some duties of this character have been given recognition in treaties and international agreements, but such stipulations are for the most part directed to the political organs of government and constitute political questions which can not be enforced as municipal law. An exception, however, may be made in one case. The duty to abstain from interference with neutral commerce,

except as permitted by international law, is enforced by municipal law through the adjudication of all neutral seizures in prize courts. This method of enforcing duties of abstention will therefore be considered.

(2) The belligerent's duties of acquiescence relate largely to the neutral's duties of vindication. In performing these duties the neutral state subjects belligerent troops, public vessels and prizes to its jurisdiction in a manner which would be considered as an indignity under ordinary circumstances. These conditions the belligerent must acquiesce in. It must not complain when a neutral interns its troops or ships of war and assumes prize jurisdiction over its captures, provided such acts are required by international law. Acquiescence in such actions or its reverse, however, are acts of sovereignty and beyond the control of municipal law.

(3) The belligerent's duties of prevention bear a relation to the neutral's duties of vindication. Acts which the neutral is obliged to vindicate if committed, the belligerent is obliged to prevent. As the belligerent in exercising rights peculiar to that status comes in contact with neutrals through its army and navy, its duties of prevention require it to exercise control over those agencies of government. It is through this control that municipal law can be most effective in enforcing international obligations of belligerent to neutral states. The municipal means for preventing infractions of international law by such agencies of government will therefore concern us.

(4) A belligerent state has no duty of vindication. It is itself the aggressive party in its relations with neutrals and consequently no occasion is apt to arise for vindicating its sovereign rights as against neutrals. Resembling the neutral's duty of vindication is the belligerent's right of self-help, by which it is permitted to requisition the property of neutrals under certain circumstances, to draft resident aliens into its armies and subject them to numerous inconveniences and losses in case of military necessity, to visit and search neutral merchant vessels, and confiscate them in well defined cases. These acts resemble duties of vindication in that they are acts involving foreign individuals and are specifically defined by international law, but they are in no sense duties. No one but the belligerent is benefited by their performance and there will be no violation of international law if they are not performed. It

is a belligerent right which is here in question and the accompanying duty is that which is owed to the neutral state to abstain from exceeding these privileges and to prevent an illegal exercise of them by its land and naval forces. These subjects are considered under obligations of abstention and prevention.

(5) Reparation is a belligerent duty, but, as noted in the case of a neutral, it is not a duty peculiar to the status of belligerency. It is a duty universally required in cases of breaches of international law. Because of the probability of illegal acts in the heat of war, the question of reparation is particularly prominent in relation to belligerent communities. As examples of reparation by the United States as a belligerent may be mentioned the case of the Florida, in which the United States made public apology for a capture in the territorial waters of Brazil,[1] and the Trent affair, in which the United States restored two confederate officers taken from a British vessel during the civil war.[2] As the principles of municipal law relating to the enforcement of this duty are applicable to reparation in all cases, further discussion has been given under that head, in the general division of the law of peace.

The obligations of belligerents to neutrals which may be enforced by municipal law will therefore be considered under the two heads, (1) obligations of abstention, and (2) obligations of prevention. In the first case, international law itself defines the obligations which are binding upon the government. Courts in giving effect to such obligations therefore apply international law. In the second case, international law defines the conduct which land and naval forces must pursue in dealing with neutrals, but it does not prescribe the measures which the government must take for enforcing this conduct. The means which may be taken for preventing infractions of international law by agencies of government, are left to the discretion of the belligerent state. They are therefore rules supplementary to international law.

[1]Case of the Florida; See Moore's Digest, 2;367: 7;1090.
[2]Case of the Trent, see Moore's Digest, 2;1001: 7;626, 768.

CHAPTER XI. OBLIGATIONS OF ABSTENTION.

INTRODUCTORY.

A number of obligations of abstention have received specific recognition in treaties and international agreements to which the United States is a party, and are therefore according to the constitution part of the law of the land. In the Hague conventions the United States has bound itself to abstain from exercising war rights against neutrals until it has notified them of the outbreak of war,[1] from committing hostilities in neutral territory or in neutral waters,[2] and from using neutral harbors or territory as bases of naval or military operations or for the undue asylum of war vessels.[3] In special treaties as well as the Hague conventions and the Declaration of London, which, however, is unratified, it has agreed to abstain from injuring neutral individuals in person or property except in accordance with specified rules.[4] Although so far as these rules bind the state they are sanctioned by considerations of policy rather than by municipal law, yet a belligerent acts through its agencies of government, largely its army and navy. The duties of abstention imposed upon it may be to a considerable extent guaranteed by the control of these bodies through municipal law. Looked at from this standpoint the duties in question become duties of prevention. What a belligerent community is bound to abstain from doing, it is bound to prevent its army and navy from doing. Such duties may be controlled by municipal law and will be considered under obligations of prevention.

Municipal law may also serve to make the obligations effective through the action of constitutional checks between

[1] Hague Conventions, 1907, iii, art. 2, Malloy, p. 2266.

[2] *Ibid.*, 1907, v, art. 1; xiii, art. 1, Malloy, pp. 2297, 2358.

[3] *Ibid.*, 1907, xiii.

[4] See treaties guaranteeing "free ships, free goods", infra p. 164, note 106; specifying rules of blockade, infra. p. 149, note 12; freedom of vessels under neutral convoy, infra. p. 182, note 49; freedom of neutral trade, infra. p. 162, note 95, p. 182, note 50; specifications for the exercise of the right of visit and search, infra. p. 182, note 51; and the immunity of resident neutral persons from military service, infra. p. 174, note 9.

departments of government. Thus the courts may be given authority to control the action of the executive in seizing neutral property. This situation actually exists in the provisions of municipal law requiring the adjudication of all maritime seizures by prize courts before their confiscation. The judiciary here, by its power to liberate prizes, acts as a check upon the abuse of authority by the executive, and in so far as it actually applies rules of international law in determining prize cases, enforces the belligerent government's duty to abstain from illegally interfering with neutral commerce.

It must not, however, be forgotten that the prize court, although it may apply international law, is a court of the belligerent state and is always bound by municipal law. It has no authority as against the sovereign power in its state. It is only over one branch of the government that its authority exists.

The fact that the belligerent state controls the prize court, a condition which it was hoped would be remedied by the establishment of an international prize court, inevitably puts the neutral claimant at a disadvantage in litigating, and were it not for the pressure of his own government and the sanctions of international opinion, he would not receive his rights, as is indicated by the distinct difference in the enforcement of neutral rights when most of the great powers are belligerent and when most of them are neutral.

It is the belligerent state's duty to make its prize court, in the words of Lord Stowell, "a court of the law of nations".[5] Yet as it is a court of the belligerent state the law which it enforces is by definition municipal law. Here therefore we have a case where we should expect to find international law enforced directly as a part of municipal law. We should expect to find the rules applied by prize courts, rules of both international law and municipal law. Both English and American prize courts have on numerous occasions assured us that this is the situation which actually exists,[6] yet with a few cases to the

[5]The Recovery, 6 Rob. 348, (1807). See T. E. Holland, Studies in International Law, p. 196.

[6]Cases asserting that prize courts apply international law. English—The Maria, 1 Rob. 350, (1799); The Recovery, 6 Rob. 348, (1807); The Minerva, (1807); The Fox, Edw. Adm. 312, (1811); Le Louis, 2 Dods. 239, (1817); The Annapolis, 30 L. J. Pr. M. and Ad. 201. See also Phillimore, International Law, 3; sec. 436. For discussion of these cases see Holland, op. cit. 196. The first three of these cases are authority for the view that prize courts must apply international law even when con-

contrary we have also been informed that even a prize court is bound to obey a positive mandate of its government, even when in conflict with the law of nations. Lord Stowell seized the dilemma by the horns. "These two propositions," he said, "that the court is bound to administer the law of nations and that it is bound to enforce the king's orders in council are not at all inconsistent with each other," because one could not "without extreme indecency" presume that a conflict could exist.[7] In the United States Chief Justice Marshall solved the dilemma by resort to the magic power of legal interpretation. "It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country."[8]

Neither Stowell's confidence in the impossibility of a conflict nor Marshall's reliance upon interpretation can obscure the fact that conflicts between the law of nations and of the nation have occurred and have been so direct that no interpretation can avail.[9] In such circumstances prize courts, the same as any other courts, must obey municipal law.[10] A failure to

trary to municipal law. United States cases—Talbot vs. Seamans, I Cranch 1, 37, (1801); The Nereide, 9 Cranch 388; United States vs. The Active, Fed Cas. 759; Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191; The Scotia, 14 Wall. 170; The Paquete Habana, 175 U. S. 677.

[7]The Fox, Edw. Adm. 312, (1811).

[8]Murray vs. The Charming Betsey, 2 Cranch 64, 118, (1804).

[9]Strangely enough the very case in which Lord Stowell spoke involved just such a conflict. The orders in council upon the basis of which he decreed condemnation of the neutral vessel before him, have been universally denounced as contrary to international law. See article entitled Disputes with America in *Edinburgh Rev.*, Feb. 1812, 19;290, severely censuring Lord Stowell's alteration of opinion from 1798 to 1811, quoted Moore's Digest, 7;648-651. Phillimore in his international law, 3; sec. 436, implies a similar censure. "If he (Lord Stowell) had not so considered them (i.e. considered the orders in council to be consistent with international law) and nevertheless executed them, he would have incurred the same guilt and deserved the same reprehension as the judge of a municipal court who executed by his sentence an edict of the legislature which plainly violated the law written by the Creator upon the conscience of his creature." See Holland, op. cit. p. 198.

[10]Regina vs. Keyn, L. R. 2 Ex. D. 160; The Schooner Exchange vs. McFaddon, 7 Cranch 116; Murray vs. The Charming Betsey, 2 Cranch 64; Mortenson vs. Peters, 14 Scot. L. T. R. 227, (1906) Bentwich, p. 12.

do so would be a dereliction of duty on the high way to rebellion. The duty therefore rests with the belligerent state to see that the law applied by its prize courts is international law. We will examine the principles of law thus applied in the United States, in cases involving the rights of neutral individuals. They are to be found largely in prize court decisions, but there have also been statutes, treaties, and executive orders stating principles of this branch of law which the courts are bound to observe.

NEUTRAL PROPERTY AT SEA.

The doctrine is maintained in the United States that title to property seized at sea does not vest until after decision of the court.[11] The government, therefore, appears before the prize court as an applicant for condemnation while the neutral individual claims restitution, compensation, damages, or, if the vessel is a recapture, restoration.

The bases upon which condemnation of neutral vessels and property are justified under international law are (1) breach of blockade, (2) carriage of contraband, (3) unneutral service, (4) presumption of enemy character, (5) necessity or the right of angary. The belligerent government will therefore claim condemnation on one of these grounds. The neutral owner will claim restitution if the belligerent does not make good his claim for condemnation; he will claim compensation if in such a case the vessel has been sold, destroyed or requisitioned; he will claim damages if the vessel has been seized without probable cause or has not been treated with proper care in bringing in; or he will claim restoration if he is an original owner of a recaptured prize.

GROUNDS FOR CONDEMNATION.

(1) *Breach of Blockade.* In a number of early treaties the principles of blockade were laid down, requiring effectiveness and sometimes individual notification of vessels.[12] The

[11]The Adventure, 8 Cranch 221, (1814); The Nassau, 4 Wall. 634; The Nuestra Senora de Regla, 108 U. S. 92, 103, (1882); The Tom, 29 Ct. Cl. 68, 97, (1894); Grundy, Att. Gen., 3 op. 377, (1838). See letter of Sir W. Scott, (Lord Stowell) and Sir J. Nicholl, to Mr. Jay, 1794, stating the general principles of prize law and the necessity of adjudication. Am. St. Pap., 1;494, printed in Moore's Digest, 7;603-608.

[12]Effectiveness has been required in nineteen treaties with thirteen countries, of which the following are in force: Bolivia, 1858, art. 18,

Declaration of London of 1909[13] lays down the rules of blockade at length. This treaty, however, has not received general ratification, although the United States senate has approved it.

The United States has instituted blockades during the Mexican, Civil and Spanish wars. On these occasions the law to be applied in dealing with neutrals was defined in proclamations declaring the blockades and instructions to naval commanders. The prize courts in applying the law have relied on these treaties, proclamations and instructions in addition to judicial precedents and general principles of international law on the subject. In proclamations and instructions the principles that the blockade must be effective and declared in order to be binding have been generally specified. Individual warning, however, has usually not been required. The whole practice on the subject stating these points was embodied in Stockton's Naval war code in force as a general order of the Navy Department from 1900 to 1904.[14]

Malloy, p. 119; Colombia, 1846, art. 18, p. 308; Italy, 1871, art. 13, p. 973; Sweden, 1783-1798, revived, 1816, 1827, art. 10, p. 1728.

Individual notification of vessels ignorant of blockade has been required in twenty-one treaties with seventeen countries, of which the following are in force: Bolivia, 1858, art. 26, p. 120; Colombia, 1846, art. 20, p. 308; Italy, 1871, art. 13, p. 973. Individual warning unless the vessel could have heard of the blockade has been required in six treaties with five countries, of which the following are in force: Sweden, 1827, art. 18, p. 1754; Prussia, 1828, art. 13, p. 1500; Greece, 1837, art. 16, p. 853. See also Moore's Digest, 7;827.

[13]Declaration of London, Charles, Treaties, 1913, pp. 269-272, signed Feb. 26, 1909. Ratification advised by senate, Apr. 24, 1912.

[14]Proclamations of Blockade: Aug. 19, 1846, by Commodore Stockton, (Moore's Digest, 7;790, Br. and For. St. Pap. 34;1139); Apr. 19, 27, 1861, by President Lincoln, (12 stat. 1259); Apr. 30, 1861, by Commander Prendergast, (F. H. Upton, Law of Nations affecting commerce during war, 3rd ed., N. Y. 1863, p. 487); Apr. 22, 1898, by President McKinley, (30 stat. 1769). Naval Instructions relating to blockade, May 14, 1846, (Moore's Digest, 7;828; Br. and For. St. Pap., 34;1139); Dec. 24, 1846, (Moore's Digest, 7;790); May 8, 1861, (Prize cases, 2 Black 676); Nov. 6, 1861, May 14, 1862, (Upton, op. cit., p. 490); Aug. 18, 1862, (Official Records, Union and Confederate Navies, Ser. 1, 1;417, Moore's Digest, 7;700); June 20, 1898, (Gen. Ord., Navy Dept., 1898, No. 492, For. Rel., 1898, p. 780, Freeman Snow, International Law, 2nd. ed., Washington, 1898, p. 174); June 27, 1900, Stockton's Naval War Code, (Gen. Ord., Navy Dept., 1900, No. 551, revoked Gen. Ord., Navy Dept., Feb. 4, 1904, No. 150, Printed, Naval War College, International Law Discussions, 1903, p. 112).

The courts have held that proof of three questions of fact is necessary to justify condemnation, (1) existence of blockade, (2) knowledge on the part of the violating vessel, (3) actual or constructive violation.[15] To exist, a blockade must be effective,[16] but a single cruiser may be sufficient to make it so;[17] it need not be declared, de facto blockades having been considered legitimate,[18] although they are denounced by the Declaration of London,[19] and it terminates only on notification or occupation of the port.[20]

Knowledge of the blockade will be presumed[21] when the vessel left port after notification to that government,[22] or had an opportunity to learn of the blockade en route.[23] An individual warning is only necessary when required by treaty[24] or where the vessel sailed before notification and arrived in ignorance of the blockade.[25]

In defining the acts constituting a violation of blockade the courts in the civil war cases seem to have gone beyond the bounds of international law.[26] Besides attempting to enter[27]

[15]The Nayade, Fed. Cas. 7,046; The Betsey, 1 Rob. 29; The Nancy, 1 Act. 59.

[16]The Andromeda, 2 Wall. 48; The Baigorry, 2 Wall. 474.

[17]The Olinde Rodriguez, 174 U. S. 510.

[18]The Adula, 176 U. S. 361.

[19]Declaration of London, 1909, art. 8.

[20]The Baigorry, 2 Wall. 474; The Josephine, 3 Wall. 83; The Circassian, 2 Wall. 135; The Adula, 176 U. S. 361.

[21]Condemnations without special warning—The Circassian, 2 Wall. 135; The Hallie Jackson, Blatch. 248; The Empress, Blatch. 175; The Prize Cases, 2 Black 635; The Revenge, 2 Sprague 107; The Hiawatha, 2 Black 677; The Admiral, 3 Wall. 603; The Cornelius, 3 Wall. 214; The Herald, 3 Wall. 768; U. S. vs. Halleck, 154 U. S. 537; The Adula, 176 U. S. 361; The Cheshire, 3 Wall. 231.

[22]The Circassian, 2 Wall. 135.

[23]U. S. vs. Halleck, 154 U. S. 537, (1864).

[24]Fitzsimmons vs. Newport Ins. Co., 4 Cranch 185, (1818).

[25]The Nayade, Fed. Cas. 7046; Yeaton vs. Frey, 5 Cranch 335, (1809).

[26]This is partly accounted for by the fact that the court considered the civil war blockade a municipal rather than an international measure. For an interesting statement of this view, written while the war was in progress, see Upton, op. cit., pp. 298-307. He says, "No one surely whose intelligence is not clouded by prejudice or obscured by selfish considerations can fail to perceive the broad distinction between that blockade which is proclaimed by a sovereign nation of a portion of its own ports, for the purpose of quelling a domestic insurrection and compelling the

or leave[28] a blockaded port or hovering about in a suspicious manner,[29] the court applied the doctrine of continuous voyage to blockade, condemning cargoes bound for blockaded ports by transhipment.[30] No limits to the zone of operations were required. Vessels with an "intent" to break blockade were held liable from the beginning of the voyage to the end of the return voyage[31] and even on a subsequent voyage.[32] These rules were

misguided insurgents to 'unthread the rude eye of rebellion and welcome home again discarded peace', and that which is ordered and enforced by a sovereign government of the ports of its foreign enemy, for the purpose of paralyzing his power and compelling him to repair his wrongs, and submit to the terms of equitable pacification." p. 301. This view is wholly indefensible by modern international law. The law of blockade is for the benefit of neutrals and it makes no difference to them whether the war is rebellion or international war—they have a right to the same law in either case.

[27]Fitzsimmons vs. Newport Ins. Co., 4 Cranch 185, 200; McCall vs. Marine Ins. Co., 8 Cranch 59; The Diana, 7 Wall. 354; The Nuestra Senora de Regla, 17 Wall. 29.

[28]The Jeune Nelly, in U. S. vs. Guillam, 11 Wall. 47; The Tropic Wind, Fed. Cas. 14,186, 16,541a; The Hiawatha, Fed. Cas. 6451, affirmed, 2 Black 677; The Lynchburg, Fed. Cas. 8637a, 8638, 8639; The Crenshaw, Fed. Cas. 3384, affirmed, The Prize Cases, 2 Black 635. Days of grace have generally been allowed in which vessels in port may leave. In the civil war cases no cargo could be loaded in this time, The Hiawatha, Fed. Cas. 6451, although a limited permission to do so was given by the Navy Instructions of May 8, 1861, see Prize Cases, 2 Black, 676. According to the instructions of 1898 and Stockton's Naval War Code cargo may be loaded in this time.

[29]The Cheshire, 3 Wall. 231; The Coosa, 1 Newb. Adm. 393; The Hiawatha, Blatch. 1, Fed. Cas. 6451; The Empress, Blatch. 175; The Josephine, 3 Wall. 83; The Dashing Wave, 5 Wall. 170; The Teresita, 5 Wall. 180; The Newfoundland, 176 U. S. 97, (1900); The Cornelius, 3 Wall. 214.

[30]The Circassian, 2 Wall. 135; The Springbok, 5 Wall. 1, (1866); The Bermuda, 3 Wall. 514; The Flying Scud, 6 Wall. 263; The Thompson, 3 Wall. 155. In The Peterhoff, 5 Wall 28 it was held that a transhipment by land could not be regarded as a breach of blockade.

[31]The Galen, 37 Ct. Cl. 89, (1901); The Admiral, 3 Wall. 603; The Circassian, 2 Wall. 135; The Baigorry, 2 Wall. 474; The Cornelius, 3 Wall. 214; The Jenny, 5 Wall. 183; The Adela, 6 Wall. 266.

[32]The Mersey, Fed. Cas. 9,489, reversed Fed. Cas. 9,490; The Major Barbour, Fed. Cas. 8,983; The Joseph H. Toone, Fed. Cas. 7,541. The principle of liability on a subsequent voyage was not relied upon exclusively in these cases. For discussion see Upton, op. cit. p. 288. Contra, see The Wren, 6 Wall. 155.

quite generally denounced by European publicists, although in a number of cases which were subsequently submitted to arbitration the American position was sustained.[33] They are however in conflict with the Declaration of London, which forbids the application of "continuous voyage" to blockade and requires that captures be limited to the zone of operation of the blockading squadron.[34]

Forfeiture of vessel and cargo has been the usual penalty for breach of blockade, though in a few cases, where the owner of part of the cargo was ignorant of the intent of the vessel, the cargo was restored,[35] while in other cases, where, applying the doctrine of continuous voyage, it was the cargo alone which had a blockaded destination, the vessel was released.[36]

(2) *Carriage of Contraband.* Early treaties generally contained lists of articles which could alone be declared contraband,[37] and sometimes free lists were also included.[38] One of

[33]The case of The Springbok, 5 Wall. 1, (1866), in which a cargo destined for transhipment to a blockade runner at Nassau, New Providence was condemned, aroused the severest criticism. It was denounced as a retrogression to the practice of paper blockade so prominent in the Napoleonic wars. See Moore's Digest 7;723-739, in which opinions of Lord Russell, Twiss, Phillimore, Bluntschli, Fiore, and others are given. For arbitral awards under Art. 13, treaty of Washington of 1871, *Ibid.* 7;725, Moore Int. Arb., 4;3928-3935.

[34]Declaration of London, 1909, art. 17, 19.

[35]The Springbok, 5 Wall. 1; The Flying Scud, 6 Wall. 263.

[36]The Springbok, 5 Wall. 1.

[37]Contraband lists generally consisting of four classes of articles, (1) arms and ammuntion, (2) military clothes and accoutrements, (3) horses and their furniture, (4) other instruments especially for use in war have been included in twenty-six treaties, with twenty countries of which the following are in force: Bolivia, 1858, art. 17, Malloy, p. 119; Italy, 1871, art. 15, p. 974; Prussia, 1799-1810, revived 1828, art. 13, p. 1491; Sweden, 1783-1798, revived 1816, 1827, art. 9, p. 1728. Most of these treaties specify that no other articles shall be subject to confiscation as contraband, although this is not true of those with Italy and Prussia. In addition to these classes of articles, the treaty with Great Britain of 1794-1807, (art. 18, p. 601) included navy stores, and stated that "provisions and other articles not generally contraband may be regarded as such" and may be seized upon indemnifying the owner for their value with an allowance for profit, and damages caused by the detention. Treaties with Salvador, (1850-1870, art. 19, p. 1543; 1870-1893, art. 19, p. 1557) add "provisions that are imported into a besieged or blockaded place" to the contraband list, though it is difficult to see why such goods

the most remarkable provisions is that in the Prussian treaties of 1785 and 1799, the latter of which was renewed in 1828 and is still in force,[39] in which contraband is declared abolished as between the two countries with the proviso that goods formerly deemed contraband might be detained and requisitioned on payment of full compensation to the neutral owner. The Declaration of London[40] contains a codification of the law of contraband, embracing lists of absolute contraband, conditional contraband and free goods. These lists, however, have not been adhered to in subsequent wars.

Naval instructions beginning with those of the continental congress of 1776[41] have been issued at the beginning of wars specifying contraband lists and enjoining naval officers to respect neutral rights. Few cases involving contraband were decided in the Revolutionary war, the War of 1812, the Mexican or the Spanish wars. The Civil war cases alone are of importance. In these the courts appear to have been guided largely

would not be liable under the law of blockade, and a treaty with Two Sicilies of 1855-1861, (art. 3, p. 1816) includes "troops whether infantry or cavalry" under the name of contraband. The treaties with Prussia, Italy and Venezuela, (1836-1851, art. 18, p. 1836; 1860-1870, art. 13, p. 1850) exclude horses from the contraband list.

[38]The treaties with France, 1778-1798, art. 24, p. 496; Spain, 1795-1902, art. 16, p. 1646; Sweden, 1783-1798, revived 1816, 1826, art. 8, p. 1728, among other things put textiles, gold, iron, copper, coal, grain, provisions, navy stores, and lumber on the free list. That with Netherlands, 1782-1795, art. 24, p. 1240, puts navy stores and machines for manufacturing war material on the free list.

[39]Treaties with Prussia, 1785-1796, art. 13, p. 1481; 1799-1810, revived 1828, art. 13, p. 1491. See U. S. vs. Diekelman, 92 U. S. 526 for interpretation of this provision. It has also been made the basis of compensation in the recent (1915) case of the United States vessel William P. Frye.

[40]Declaration of London, 1909, Charles, Treaties, 1913, p. 272.

[41]Naval instructions April 3, 1776, (Journal of the Continental Congress, W. C. Ford, ed., 4; 253, Journal of Congress, 1; 244, G. W. Allen, A Naval History of the American Revolution, N. Y., 1913, 2 vols., 2;695); Apr. 7, 1781, (Jour. Cong., Ford, ed., 19; 361); 1812, (2 Wheat. App., 80-81; Moore's Digest, 7;516), May 14, 1846, (Br. and For. St. Pap. 34;1139), May 14, 1862, (Upton, op. cit. p. 490); Aug. 18, 1862, (Official Rec. Union and Conf. Navies, Ser. 1, 1;417); June 20, 1898, (Navy Dept., Gen. Ord., 1898, No. 492, For. Rel., 1898, p. 780); June 27, 1900, Stockton's Naval War Code, (Naval War College, International Law Discussions, 1903, p. 112).

by British precedents, mostly those of Lord Stowell in the Napoleonic era.[42]

All cases have held that the concurrence of (1) a hostile character in the goods themselves and (2) a hostile destination is necessary for condemnation. The courts have drawn the distinction between absolute and conditional contraband, holding that the former may be condemned if destined to the enemy country,[43] while the latter is only liable if bound for the use of the enemy army.[44] The doctrine of continuous voyage has been applied to both absolute[45] and conditional contraband.[46] It was this question which occupied most attention in the Civil war cases. British vessels were in the habit of landing cargoes in the West Indies or in Mexico near the Texan frontier for transhipment in blockade runners or by land to the Confederate states.[47] Such vessels, if captured on the first limb of the voyage, that is while sailing between two neutral ports, were usually condemned.[48] The grounds of condemnation were not always clear. In most of these cases, carriage of contraband and breach of blockade were both suggested.

The penalty imposed for carriage of contraband was ordinarily condemnation of the contraband cargo alone,[49] though free goods of the owner of contraband were generally declared "infected" and condemned.[50] Evidence of bad faith such as

[42]On force of British prize court precedents in United States courts see Marshall in Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191, 198, (1815), quoted Moore's Digest, 7;598, "The United States having at one time formed a component part of the British Empire their prize law was our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it."

[43]The Peterhoff, 5 Wall. 28, 58, (1866).

[44]The Commercen, 1 Wheat. 382, (1816).

[45]The Dolphin, Fed. Cas. 868, (1863); The Bermuda, 3 Wall. 514, (1865).

[46]The Pearl, 5 Wall. 574, (1866); The Peterhoff, 5 Wall. 28, (1866).

[47]For complete statement of the conditions of contraband trade during the Civil war see the Stephen Hart, Blatch. 387, (1863), Scott, 852, affirmed in the Hart, 3 Wall. 559. See also Moore's Digest, 7;698-739.

[48]Instructions of the Secretary of the Navy, Aug. 18, 1862, authorized seizure of vessels carrying contraband for the insurgents "to their ports directly or indirectly by transhipment". See Moore's Digest, 7;700.

[49]The Peterhoff, 5 Wall. 28, (1866); The Commercen, 1 Wheat. 382, (1816).

[50]The Lucy, 37 Ct. Cl. 97, (1901); The Bird, 38 Ct. Cl. 228, (1903); The Peterhoff, 5 Wall. 28.

destruction of papers,[51] giving of false destination[52] and being involved in blockade running[53] were held to condemn the vessel also. Ordinarily liability was held to cease with the deposit of contraband goods, but this was not true, the vessel being condemned on her return voyage if a false destination were given.[54]

(3) *Unneutral Service.* The transportation of troops and the carriage of dispatches, which are the commonest offenses included under the offense of unneutral service, are sometimes spoken of as analogues of contraband. In reality the offense is distinctly different from that of carrying contraband. The idea of destination inseparable from contraband trade is not necessarily included. It is the service, ordinarily coupled with an unneutral intent, that creates the offense.[55] The similarity to contraband trade, however, is evident, and in a treaty of 1855 with Two Sicilies[56] naval and military troops were included in the contraband lists. A large number of treaties in stipulating that free ships shall make free goods add that enemy persons on neutral vessels shall "not be taken out of that ship unless they are officers or soldiers and in the actual service of the enemies",[57] thus indicating that persons of the latter class are liable and strongly implying that they may be taken out of a vessel overtaken at sea, a position which was protested by Great Britain in the Trent case.[58] The Declaration of London

[51]The Bermuda, 3 Wall. 514.

[52]The Lucy, 37 Ct. Cl. 97, (1901); The Joseph, 8 Cranch 451; Carrington vs. Merchants Ins. Co., 8 Pet. 494.

[53]The Dolphin, Fed. Cas. 868; The Pearl, 5 Wall. 574; The Hart, 3 Wall. 559; The Gertrude, Fed. Cas. 5,369, 5,370.

[54]The Lucy, 37 Ct. Cl. 97, (1901); The Joseph, 8 Cranch 451; Carrington vs. Merchants Ins. Co., 8 Pet. 494. In the Betsey and Polly, 38 Ct. Cl. 30, (1902), it was held that giving a false destination does not condemn on return voyage when there is no contraband on board and the real destination is unblockaded.

[55]On distinction of contraband trade and unneutral service see Marquardson on the Trent case, quoted Moore's Digest, 7;775.

[56]Treaty with Two Sicilies, 1855-1861, art. 3, Malloy, p. 1816.

[57]Seizure of military persons on neutral vessels has been provided in twenty-seven treaties with nineteen countries, of which the following are in force: Bolivia, 1858, art. 16, Malloy, p. 119; Colombia, 1846, art. 15, p. 306; Italy, 1871, art. 16, p. 974; Prussia, 1785-1796, revived 1828, art. 12, p. 1481; Sweden, 1783-1798, revived 1816, 1827, art. 7, p. 1727.

[58]See Moore's Digest, 7;775.

distinguishes two classes of unneutral service.[59] Lesser offenses subject the vessels to the treatment of neutral contraband carriers, while graver offenses amounting to a direct participation in naval movements subject them to the treatment of enemy merchant vessels.

In the Chesapeake affair of 1807[60] and in other cases preceding and causing the War of 1812 the United States objected to the taking of military persons from its vessels when neutral. In these cases the illegal impressment of neutral persons was also involved. The Trent affair[61] during the Civil war, which involved the seizure of Confederate emissaries from a British vessel, was settled diplomatically and unfavorably to the right of such seizure. Here the vessel was not brought in for prize adjudication, seizure being made on the sea, but this practice seems to have been contemplated in a large number of the United States treaties of that time,[62] although not by any treaties with England. It also seems to be countenanced by the Declaration of London.[63] The seizure in the Trent case, however, was complicated by the fact that the persons seized were diplomatic emissaries accredited to a neutral government, rather than military persons, and consequently should have enjoyed diplomatic immunities.

No cases involving unneutral service appear to have come up in United States prize courts.[64] English precedents, however, which are usually of weight in United States prize courts,[65] have held that vessels may be condemned not only on the basis of employment by the enemy government but also for knowingly or fraudulently giving aid through carriage of troops, military persons or dispatches.[66] Where knowledge or fraud is

[59]Declaration of London, arts. 45, 46.

[60]See Moore's Digest, 2;991, 1001.

[61]See Moore's Digest, 7;768-779.

[62]Supra, p. 156, note 57.

[63]Declaration of London, art. 47.

[64]Seizure of vessels engaged in unneutral service was authorized by the Naval instructions of 1898, art. 16, For. Rel., 1898, p. 781, and Stockton's Naval War Code, 1900-1904, arts. 16, 20.

[65]In regard to English prize court precedents in United States courts see Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191, 198, (1815), Moore's Digest, 7;599, Supra, p. 155, note 42.

[66]Carriage of troops and military persons—The Caroline, 4 Rob. 256, (1802); The Friendship, 6 Rob. 320, (1807); The Orozemba, 6 Rob. 430, (1807); Carriage of Dispatches—The Atalanta, 6 Rob. 440, (1808); The Constantia, The Susan, The Hope, see Moore's Digest, 7;759-762.

not proved the vessel has usually been restored but on condition that it pay the captors' expenses,[67] the ground being taken that the belligerent has a right of seizing, bringing in and investigating neutral vessels suspected of unneutral service, even where condemnation is not warranted.

(4) *Presumption of Enemy Character.* The general rule applies that enemy property at sea is liable to confiscation. The belligerent will therefore claim condemnation of vessels and goods apparently neutral if their real ownership or the actual right to their use is enemy. The enemy or neutral character of property may be determined in a number of different ways, as by the nationality of the owner, the domicile of the owner, the location of the goods, or the flag of the vessel. Where the character of the goods depends upon the character of the owner, the question of who is the owner when goods are in transit arises.

By the Declaration of London,[68] the neutral or enemy character of a vessel is determined by the "flag which she is entitled to fly" and of goods on board an enemy vessel by the "neutral or enemy character of the owner," the title ordinarily remaining with the seller until the destination is reached.

These principles have been generally adhered to by United States courts, but the character of goods or of their owner has been interpreted in accordance with the Anglo-American principle of territoriality as opposed to nationality. Thus goods owned by an inhabitant of enemy territory, irrespective of his sympathy[69] or nationality,[70] have been considered enemy goods. Goods employed in the enemy service[70] or the produce of enemy soil[72]

[67]The Caroline, 6 Rob. 461, (1808); The Madison, Edw. Adm. 224, (1810); The Rapid, Edw. Adm. 228, (1810); See Moore's Digest, 7;762-763.

[68]Declaration of London, 1909, art. 58-60.

[69]Mrs. Alexander's Cotton, 2 Wall. 404, 419; The Benito Estenger, 176 U. S. 568. See Moore's Digest, 7;429-430.

[70]Chester vs. The Experiment, Fed. Court of Appeals, 2 Dall. 41, (1787); U. S. vs. Gillies, Pet. C. C. 159; Murray vs. The Charming Betsey, 2 Cranch 64, (1804); The Venus, 8 Cranch 253, (1814); The Frances, 8 Cranch 335, (1814); The Mary and Susan, 1 Wheat. 46. See Moore's Digest, 7;424-429.

[71]Darby vs. The Erstern, Fed. Court of Appeals, 2 Dall. 34, (1782); The Hart, 3 Wall. 559; The Baigorry, 2 Wall. 474. See Moore's Digest, 7;410-415.

[72]Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191, (1815); The Prize Cases, 2 Black 635, (1862). See Moore's Digest, 7;406-410.

are also regarded as enemy goods whatever the character of the owner.

The courts have held that title to property in transit is with the vendor. Thus goods enroute from an enemy seller to a neutral buyer, even when sold, are condemned as enemy property[73] and goods in transit from a neutral seller to a belligerent buyer are released as neutral property.[74] It has been hinted, however, that if the contract of sale specified that the transfer should take place on delivery to the master of the vessel, and consideration had been given, a neutral buyer might make good his claim.[75]

In addition to these general principles, international law recognizes certain circumstances which give a constructive enemy character to goods which are really neutral, in which case condemnation is permitted. This constructive enemy character has at different times and by different countries been asserted on the following grounds: (a) transfers to neutral flag, (b) acceptance of enemy convoy, protection or license, (c) resistance to visit and search or fraud, (d) engaging in closed trade, (e) carriage by neutral vessels of enemy goods, (f) shipping of neutral goods on enemy vessels.

(a) By the Declaration of London,[76] transfers of enemy vessels to a neutral flag are in general valid if made before the outbreak of hostilities, void if made after. Certain provisions and presumptions, however, are added. A more liberal rule has heretofore been applied by United States courts. Thus bona fide transfers of vessels and property, whether made before or after the outbreak of the war, have been held valid.[77] This has also been the British rule.[78] The sale, however, is presumed not bona

[73]The Ship Frances and Cargo, 1 Gall. 445, affirmed 8 Cranch 350, (1813); The Frances, 9 Cranch 183, (1815); The San Jose Indiano, 2 Gall. 268, affirmed 1 Wheat. 308, (1814).

[74]The Ship Ann Green, 1 Gall. 274, Scott, 620, (1812).

[75]The San Jose Indiano, 2 Gall. 268, affirmed 1 Wheat. 208. See Moore's Digest, 7;404-406.

[76]Declaration of London, 1909, art. 55-56.

[77]Cushing, Att. Gen., 6 op. 638, (1854); 7 op. 538, (1855). See Moore's Digest, 7;715-724.

[78]The Baltica, 11 Moore P. C. 141, (1857); The Ariel, 11 Moore P. C. 119, (1857). France and Russia have generally applied the principle that sales made after the outbreak of war are void. See French Regulations, July 26, 1778, noted Moore's Digest, 7;417; Russian Prize Regulations, March 27, 1895, quoted Moore's Digest, 7;424. Great Brit-

fide if made in transit[79] or under conditions such as the retention of enemy control or the reservation of a right to repurchase.[80] The sale of enemy warships to a neutral has been regarded as void even if bona fide.[81].

(b) While the sailing under neutral convoy exempts merchant vessels not only from capture but from visit and search, the acceptance of enemy convoy, of enemy license, or the shipping of goods in an enemy armed vessel has sometimes been held in itself to render the neutral goods and vessels liable to condemnation as of constructive enemy character.[82] In the leading United States case, however, The Nereide,[83] the majority of the court, speaking through Chief Justice Marshall, held that neutral goods laden on an armed enemy ship were exempt from capture, and this decision was followed in the Atalanta[84] a few years later. Justice Story dissented in The Nereide, holding that a distinction existed between the loading of neutral goods in unarmed and armed belligerent vessels, and the latter case, similar to belligerent convoy, gave the neutral goods enemy character. Story's opinion was followed by the court of claims in a number of French spoliation claim cases.[85] The condemnation of neu-

ain adopted this rule as a measure of retaliation by order in council, Nov. 11, 1807, Br. and For. St. Pap., 8;468; Am. St. Pap., For. Rel., 3;270. By Naval Instructions of 1870, France somewhat relaxed her practice, and admitted that the presumption of illegality in sales made during war might be overthrown by sufficient evidence. See A. P. Rivier, Principes du Droit des Gens, 2 vols., Paris, 1896, 2:414.

[79]The Ship Frances and Cargo, 1 Gall. 443, affirmed 8 Cranch 354, (1813); The Sally, 3 Wall. 451, 460, (1865).

[80]The Island Belle, Fed. Cas. 168; The Benito Estenger, 176 U. S. 568, (1899), Scott, 621.

[81]The Georgia, 7 Wall. 32, (1868); The Sally, 3 Wall, 451, 460, (1865). See also the Texan Star, Moore, Int. Arb., 3;2360 and an editorial comment by J. B. Scott, Am. Jour. Int. Law, Jan. 1915.

[82]See Danish Instructions, Mch. 28, 1810, declaring all neutral vessels good prize "which made use of British Convoy". Eighteen United States vessels were seized under this clause and a diplomatic controversy ensued which was settled by a convention of March 28, 1830, Malloy, p. 377, in which Denmark made compensation. See Moore's Digest, 7;496-499.

[83]The Nereide, 9 Cranch 388, (1815).

[84]The Atalanta, 3 Wheat. 409, (1818).

[85] The Nancy, 27 Ct. Cl. 99, (1827); The Brig Sea Nymph, 36 Ct. Cl. 369, (1901). It was held in The Galen, 37 Ct. Cl. 89, (1901), that though

tral and national vessels sailing under an enemy license or passport has been decreed in a number of cases.[86].

(c) The Declaration of London[87] provides that "forcible resistance to the legitimate exercise of the right of stoppage, search and capture" involves in all cases the condemnation of the vessel and of goods belonging to the master or owner. Similar provision was made in the United States naval instructions of 1898 and in Stockton's Naval war code.[88] The courts have invariably held the captors exempt from liability for making seizures when any of these circumstances exist,[89] and in a number of cases have condemned the vessel.[90] In most of the early treaties of the United States, neutral vessels were required to carry passports or sea letters and other papers. In some of them it was also provided that a vessel not carrying such papers could be detained and might be "declared legal prize" by a competent court unless the absence of the papers could be satisfactorily explained.[91] The courts, however, have held that in such cases neutral vessels could not be condemned even in the absence of passports, if other evidence indicated a bona fide neutral character.[92]

(d) Belligerents have at times condemned neutral vessels for engaging in a branch of enemy trade closed to them in time of peace,[93] for trading between enemy ports or even for trading

acceptance of belligerent convoy rendered the vessel liable, the liability did not inhere after voluntary seperation from it.

[86]The Julia, 8 Cranch 181; The Aurora, 8 Cranch 203; The Hiram, 8 Cranch 444; The Hiram, 1 Wheat. 440; The Ariadne, 2 Wheat. 143; Patton vs. Nicholson, 3 Wheat. 204; The Langdon Cheves, 4 Wheat. 103. See Moore's Digest, 7;395-398.

[87]The Declaration of London, 1909, art. 63.

[88]Naval Instructions, June 20, 1898. For. Rel., 1898, p. 780; Stockton's Naval War Code, art. 33.

[89]Del Col vs. Arnold, 3 Dall. 333; The Marianna Flora, 11 Wheat. 1, (1826).

[90]The Bermuda, 3 Wall. 514.

[91]Non-carriage of passports was declared to subject the vessel to condemnation in sixteen treaties with eleven countries, of which those with Bolivia (1858, art. 22, Malloy, p. 121) and Colombia (1846, art. 22, p. 309) are still in force. In six treaties with five countries, of which that with Prussia (1799-1810, revived 1828, art. 14, p. 1491) is still in force, the carriage of passports was required but failure to do so was specifically declared not to create a presumption against the vessel.

[92]The Pizarro, 2 Wheat. 227; The Venus, 27 Ct. Cl. 116. (1892).

[93]See British Rule of 1756, Moore's Digest, 7;383, also similar rule of 1793, Order in Council, Nov. 6, 1793, Lawrence, op, cit. p. 717. Historical account of the growth of these rules, 1 Wheat. 530, App. ii.

with the enemy at all.[94] In a large number of its treaties[95] the United States has agreed as a belligerent to recognize the right of citizens of the other contracting party to free navigation between neutral and enemy ports and between two enemy ports; and in none of its wars has it condemned neutral vessels, even when not protected by treaty, on the basis of engaging in closed trade.[96] The condemnation of vessels of American citizens trading with the enemy is based on an entirely different principle and is really not governed by international law at all.[97] In insurance cases[98]

[94]See Napoleon's Berlin, (Nov. 21, 1806) and Milan, (Nov. 23, 1807, Dec. 17, 1807) decrees and British Orders in Council, (Jan. 7, 1807, Nov. 11, 1807, Mch. 15, 1915). Texts of all but the last, Br. and For. St. Pap. 8; 401-513; DeMarten's Nouveau Recueil, 1;433-549; Am. St. Pap., For. Rel. 3;262.

[95]The freedom of neutral trade has been guaranteed in twenty-five treaties with eighteen countries, of which the following are in force: Bolivia, 1858, art. 15, 18, Malloy, p. 119; Colombia, 1846, art. 15, 18, p. 206; Italy, 1871, art. 16, p. 974; Prussia, 1785-1796, revived, 1828, art. 12, p. 1481; Sweden, 1783-1798, revived, 1816, 1827, art. 7, p. 1727.

[96]Dicta in some civil war cases seems to indicate that such trade creates an enemy character. See The Hart, 3 Wall. 560.

[97]The condemnation of property of citizens engaged in trade with the enemy should be regarded as a matter of domestic policy, rather than of international law. Such trade has always been branded as illegal and creating a constructive enemy character by the United States, see The Rapid, 8 Cranch 155, (1814); Rush, Att. Gen., 1 op. 175, (1814); The Alexander, 8 Cranch 169, (1814); The Sally, 8 Cranch 382, (1814); The St. Lawrence, 8 Cranch 434, (1814); The Thomas Gibbons, 8 Cranch 421, (1814); The Rugen, I Wheat. 63, (1816); Jecker vs. Montgomery, 13 How. 498, 18 How. 110. See President Lincoln's proclamation Aug. 16, 1861, prohibiting all trade with the southern states, (12 stat. 1262). See Moore's Digest, 7;391-395. The United States courts have applied the doctrine of continuous voyage to such trade, The Joseph, 8 Cranch 451, 454, (1814); The Grotius, 8 Cranch 456, (1814). See Moore's Digest, 7; 388-391. In the Mary, 9 Cranch, 126, 148, (1815), the doctrine of continuous voyage acted to the advantage of a vessel which left England for the United States after the repeal of the British Orders in Council and before the news of the outbreak of the war of 1812, and consequently would have been exempt from capture under the president's instructions of Aug. 28, 1812, had she come home directly. Although she left an Irish port in which she had been forced to take shelter long after she had knowledge of the war, the court held her voyage was continuous from the innocent start in England so she could not be condemned for trading with the enemy. See Moore's Digest, 7;393.

[98]Vasse vs. Ball, 2 Dall. 270, (Pa.), See Moore's Digest, 7;387.

the United States courts have denied the legitimacy of condemnations of vessels for engaging in closed trade, or the Rule of 1756,[99] as it was called. The greater extensions of the claims to limit neutral trade put forth in the Napoleonic wars with increasing severity against neutrals were scarcely admitted even by the belligerent nations as warranted by international law, but were justified if at all as measures of retaliation against enemies. To these restrictions by means of paper blockades the United States was an incessant protestant. The charge that its own practice during the civil war was of similar character has already been mentioned in considering blockade.[100]. However, the usual practice of prize courts in the United States is to refuse to condemn neutral vessels for engaging in any trade, unless principles of blockade or contraband can be invoked, a practice which naval forces were required to observe by Stockton's Naval War Code.[101]

(e) When no question of blockade, contraband or unneutral service is involved, the general principle has been recognized from early times that neutral vessels carrying neutral cargo are exempt from seizure and condemnation. When enemy goods are loaded in a neutral vessel, three principles have at different times been acted on: (1) both goods and neutral vessel are liable, (2) the enemy goods alone are liable, (3) neither goods nor vessel may be condemned. The first principle by which a constructive enemy character is given to the neutral vessel carrying goods, is known as the doctrine of infection. It was sometimes applied in the early eighteenth century, but in recent times it has been universally repudiated and has never been applied in the United States. The second principle was the one generally applied by the United States courts, except where treaties directed otherwise, up to the time of the Spanish war. In spite of the renunciation of the principle by the Declaration of Paris in 1856, and

[99]The Rule of 1756 was inaugurated by Great Britain during a time when practically all colonial trade was closed in time of peace, and it was to this practice that the doctrine of continuous voyage was first applied. In the wars following the French Revolution, United States merchants entered the French West Indian trade which was opened to them, and in order to escape the operation of the rule of 1756, now known as the rule of 1793, transshipped at a port of the United States before going to Europe. Lord Stowell held the voyage continuous and condemned vessels bound for Europe whose cargo had originally come from the French West Indies. See Moore's Digest, 7;383, 1 Wheat. 530, App. ii.

[100]Supra, p. 153.

[101]Stockton's Naval War Code, 1900-1904. art. 19.

the consistent stand of the political department of the government in favor of "free ships, free goods" since the foundation of the republic, the courts continued to announce the condemnation of enemy property on neutral vessels as law during the civil war,[102] although all condemnations were supported by resort to principles of contraband or blockade as well. With this doctrine neutral vessels carrying enemy goods were liable to the inconvenience of seizure and detention until the enemy goods could be removed. As a partial compensation the neutral was usually allowed freight on the enemy goods condemned.[103] The third principle is known as the doctrine of "free ships, free goods." Although it acts immediately for the benefit of enemy private persons, its adoption has been brought about by the pressure of neutral powers, and it is rather as a concession to the neutral's interest in not having his vessels detained, than for the benefit of belligerent powers, that the doctrine has at length become incorporated into international law.[104] In naval instructions of the Revolutionary War the principle was provided for, and the courts at that time applied it in accord with these instructions.[105] In early treaties beginning with the first treaty concluded by the United States, that with France in 1778, "free ships, free goods" found a place,[106] sometimes though not always coupled with a stipulation for "enemy ships, enemy goods."[107] The political

[102]Early cases. The Julia, 8 Cranch 181; The Nereide, 9 Cranch 388; The Antonia Johanna, 1 Wheat. 159, (1816); The Ariadne, 2 Wheat. 143; The Caledonian, 4 Wheat. 100. For Judicial opinion during the Civil War, see the Hiawatha, Fed. Cas., 6451; The Hart, 3 Wall. 559, affirming the Stephen Hart, Blatch, 387.

[103]The Antonia Johanna, 1 Wheat. 159, Hoover vs. U. S., 22 Ct. Cl. 408, 460, (1887); The Ann Green, 1 Gall. 274.

[104]The doctrine was first authoritatively advocated by the Armed Neutrality of 1780, sponsored by Russia, see Moore's Digest, 7;558-561.

[105]Naval Instructions, Apr. 3, 1776; Apr. 7, 1781, Jour. Cong., Ford, ed., 4;253, 19;361, Allen, op. cit., 2;695. See also, Darby vs. the Brig Erstern, 2 Dall. 34, ordinance Dec. 4, 1781, Jour. Cong., 7;185, Ford, ed., 21;1158.

[106]"Free Ships, Free Goods" has been provided for in thirty treaties with twenty-seven countries, of which the following are now in force: Bolivia, 1858, art. 16, Malloy, p. 1195; Colombia, 1846, art. 15, p. 306; Italy, 1871, art. 16, p. 974; Peru, 1856, art. 1, p. 1402; Prussia, 1785-1796, revived 1828, art. 12, p. 1481; Sweden, 1783-1798, revived 1816, 1827, art. 7, p. 1727; Russia, 1854, art. 1, p. 1520.

[107]Of the above treaties in force those with Sweden and Colombia contain the stipulation of "enemy ships, enemy goods." See infra, note 111.

department of the government has supported this principle as a rule of international law since the establishment of the government,[108] but it was not applied by the courts after the Revolutionary War until the War of 1898. The principle was adopted by most of the powers through the Declaration of Paris of 1856, but this was never acceded to by the United States and during the civil war the courts continued to voice the earlier principle.[109] In proclamations and naval instructions of the Spanish war the principle was adopted, and it was also incorporated into Stockton's Naval War Code.[110] It is now undoubtedly law in the United States as well as a principle of international law.

(f) Neutral goods on enemy vessels have also been subjected to varying treatment. The three possible principles are (1) both enemy vessel and neutral goods are liable, (2) the vessel alone is liable, (3) neither the vessel nor the goods may be condemned. The first principle, known as "enemy ships, enemy goods," was frequently applied in the early eighteenth century along with the doctrine of infection at a time when neutrals were so few and lacking in force that their voice commanded no attention, but in recent times it has not been applied as a rule of international law, and was repudiated by the Declaration of Paris of 1856. It has however been frequently stipulated in treaties, as an offset to the concession of "free ships, free goods." The United States has embodied this principle in a number of treaties,[111] two of which are still in force but probably obsolete in

[108]See Moore's Digest, 7;434-453, especially letter of instructions by Secretary of State Cass to United States Minister in France, June 27, 1859, which says, "with respect to the protection of the vessel and the cargo by the flag which waves over them, the United States look upon the principle as established and they maintain that belligerent property on board neutral ships is not liable to capture," p. 450. In spite of this the courts affirmed the opposite view a few years later during the civil war. See The Hiawatha Fed. Cas., 6451, The Hart, 3 Wall. 559.

[109]The Hiawatha, Fed. Cas., 6451, The Hart, 3 Wall. 559.

[110]Telegraphic Instructions, Apr. 22, 1898, (Moore's Digest, 7;453); Proclamation, Apr. 26, 1898, (30 stat. 1770); Stockton's Naval War Code, 1900-1904, art. 19.

[111]"Enemy ships, enemy goods" has been provided for in eighteen treaties with thirteen powers, always in combination with the stipulation of "free ships, free goods," and generally with the proviso that goods of the neutral laden on an enemy vessel in a specified time, varying from two to eight months after the outbreak of the war, shall be exempt. Only two of these treaties, those with Peru, 1870-1886, (art. 19, p. 1420) and Salvador, 1870-1893, (art. 16, p. 1556) were concluded after the Declara-

this respect. The second principle, that which condemns the enemy vessel and saves the neutral goods, coupled with the principle that enemy goods in neutral vessels are liable, was laid down in the Consolato del Mare,[112] a body of sea law of the thirteenth century, and has formed the recognized rule of international law since that time. The principle was adopted in the Declaration of Paris in combination with the principle of "free ships, free goods." Although the United States did not accede to this declaration, in six individual treaties[113] of about that time it was agreed to recognize the two principles as "permanent and inviolable" rules of international law, applicable to all powers who so conceived them. The courts have consistently applied this rule in cases not covered by treaty provisions with a different requirement, but with the presumption that goods in an enemy vessel are enemy.[114] The final principle, that which contemplates the exemption of both the enemy vessel and its neutral cargo, when coupled with the existing principle of "free ships, free goods," would logically lead to the total immunity of enemy private property from seizure during war. This is a principle historically advocated by the United States, but is not at present a

tion of Paris. In these two cases existing treaties were merely revised and the clause was probably retained through lack of attention and an automatic copying of old forms; in fact in the Peruvian treaty of 1856, the principles of the Declaration of Paris had been adhered to as permanent and inviolable. At the revision of the Peruvian treaty of 1870 in 1887 the clause was omitted. Two of these treaties, those with Sweden, (1783-1798, revived 1827, art. 14, p. 1730); and Colombia, then called New Granada, (1846, art. 16, p. 307) are still in force. A convention of 1909, with Colombia, (art. 7, Charles, treaties, p. 237), provided that negotiations for the revision of the latter with a view to removing obsolete provisions should be entered into.

[112]Text of the Prize Chapters of the Consolato del Mare may be found in Wheaton, History of the Law of Nations, N. Y., 1845, p. 63; Travers Twiss, The Black Book of the Admiralty, Rolls Series, No. 55, 3;539. In his introduction to this work, Twiss gives a very full account of the origin and force of the Consolato.

[113]Treaties with Bolivia, 1858, art. 16, Malloy, p. 119; Dominican Republic, 1867-1898, art. 15, p. 408; Hayti, 1864-1905, art. 19, p. 926; Peru, 1856, art. 1, p. 1402; Russia, 1854, art. 1, p. 1520; Two Sicilies, 1855-1861, art. 1, p. 1813. The two principles of the Declaration of Paris were incorporated in a treaty with Tripoli of 1805, art. 5, p. 1789.

[114]The London Packet, 1 Mason, 14, The Amy Warwick, 2 Sprague, 150; The Carlos F. Roses, 177 U. S. 655, (1899), Scott, 637; The Lynchburg, Blatch. 57. See also Declaration of London, 1909, art. 59.

rule of international law. In its treaties with Prussia of 1785 and with Italy of 1871,[115] the latter of which is still in force, the principle was adopted as between the signatories. As the United States has never been at war with a country with which such a treaty existed, the principle has never been applied by the courts. In the two Hague conferences, the United States delegation urged the adoption of this principle. In the first conference a "voeu" was formally expressed that the question be discussed at a succeeding conference.[116] At the second conference in 1907, the matter was discussed at length and a vote was taken[117] in which twenty-one powers including Germany, Austria, Italy and the United States voted for; eleven including Great Britain, France, Russia, and Japan voted against it, while one abstained from voting.

(5) Necessity. The final rule under which condemnation of neutral property has been claimed is by the rights of preemption and angary.[118] It is asserted that in case of necessity the belligerent may seize and use any neutral property provided it is paid for. In a number of treaties preemption rather than confiscation has been provided as the treatment of contraband,[119] but the present case relates to the seizure of goods not contraband or condemnable under any excuse other than necessity. Several treaties, among them the Spanish treaty of 1902,[120] provide that vessels and property of subjects of the contracting parties when neutral shall be exempt from seizure except in case of ne-

[115]Treaties with Prussia, 1785-1796, art. 23, p. 1484; Italy, 1871, art. 12, p. 973. In a treaty with Bolivia of 1858 the contracting parties agreed to give asylum to privateers until they should relinquish that practice, "in consideration of the general relinquishment of the right to capture private property on the high seas," (art. 9, p. 117).

[116]See Moore's Digest, 7;471.

[117]Deuxieme Conference internationale de la paix, Actes et Documents, 3 vols., The Hague, 1907, 3;832.

[118]The term "angary" applied to forced service of neutral vessels and is now obsolete. See G. G. Wilson, Handbook of International Law, St. Paul, 1910, p. 416. Preemption refers to the forced sale of property. See Wilson, op. cit., p. 437.

[119]Treaties with Great Britain 1794-1807, art. 18, p. 601; Prussia 1785-1796, art. 13, p. 1481; 1799-1810, revived, 1828, art. 13, p. 1491. For interpretation of the Prussian treaty see U. S. vs. Diekelman, 92 U. S. 526. It has also been made the basis of compensation in the recent case (1915) of the United States vessel William P. Frye.

[120]Treaty with Spain, 1902, art. 5, Malloy, p. 1703.

cessity, and then compensation shall be given, to be arranged beforehand if possible.

Recognition of the right of requisitioning neutral property in case of necessity is given in the Declaration of London, the Hague Conventions, Lieber's instructions of 1863, the naval instructions of 1898 and Stockton's naval war code of 1900 to 1904.[121] In all of these cases, however, full payment for such requisitions is stated as an obligation.

CLAIMS OF THE NEUTRAL OWNER.

Having considered the claims which the captor state will offer as a basis for the condemnation of neutral prizes, the claims of the neutral owner involved may be considered. These claims may be grouped under the heads, (1) restitution, (2) compensation, (3) damages, (4) restoration.

(1) Restitution of the actual property has been recognized by the United States courts as the proper course in all cases where the government does not make good its claim to condemnation. It is the logical corollary of the principle that title to property does not change until after the decision rendered by the prize court. If the court does not support the government's claim for condemnation, the original owner's title has never been lost and he can claim the goods.

(2) Restitution, however, may be impossible. The cargo may have been requisitioned or destroyed. If enemy goods on board are condemned, a practice now repudiated, the shipper can not get freight from the consignee. In such cases the courts have held compensation to be due the innocent neutral,[122] but this is subject to important limitations. The seizure may have been justifiable because of suspicious circumstances, although there is no condemnation. Here losses caused by delay must be borne by the owner. Part of the cargo may have been destroyed through accident or the lawful exercise of belligerent rights by

[121]Declaration of London, art. 29, 49-54; Hague Conventions, 1907, iv, annex, art. 52, v, art. 19; Instructions for the government of the Armies of the United States in the Field, by Francis Lieber, Apr. 24, 1863, Gen. Ord., War Dept., No. 100, printed, Naval War College, International Law Discussions, 1903, art. 14, 38; Naval Instructions, June 20, 1898, For. Rel., 1898, p. 780; Stockton's Naval War Code, art. 3, 6, 14, 50.

[122]Declaration of London, 1909, art. 64; Hague Conventions, 1907, v, art. 19; Stockton's Naval War Code, art. 6, 14. The Nuestra Senora de Regla, 108, U. S. 92, (1882).

the captor. Here again the neutral suffers the loss of freight and goods.[123]

(3) However, restitution and compensation for actual goods seized may by no means cover the loss of the neutral. Even if the ship and cargo are intact the delay may have caused serious loss through fall of markets or breach of contract. The right of the neutral to damages in such cases has been recognized in the United States courts.[124] Damages cannot lie against the government for more than the value of the prize under adjudication,[125] but they may be had from a naval officer if the seizure was made without probable cause.[126] The burden of proof, however, is always upon the neutral claimant.[127] Except in a very clear case recovery is impossible.

(4) The claim for restoration differs from those just considered in that it is not brought by the party from whom the vessel was immediately seized, but from a former owner. It arises in cases of recapture from the enemy of a vessel or goods originally belonging to a neutral or national individual.[128] The validity of the claim depends on whether or not title had passed to the enemy captor before recapture. If it had, the vessel is enemy property, if it had not it is neutral or national property, and must be restored. The different views which have been held on

[123]The Antonia Johanna, 1 Wheat. 159, (1816).

[124]The Siren, 7 Wall. 152, (1868); The Nuestra Senora de Regla, 108, U. S. 92; Slocum vs. Mayberry, 2 Wheat. 1; The Appollon, 9 Wheat. 377; The Lively, 1 Gall. 315.

[125]In The Siren, 7 Wall. 152, (1868), a neutral vessel was run into and sunk by a captured prize. The court held the owner of the sunken vessel could recover to the value of the prize if subject to condemnation, but no more.

[126]Del Col vs. Arnold, 3 Dall. 333, (1796); Little vs. Barreme, 2 Cranch 170, (1804); The Eleanor, 7 Wheat. 345; Jecker vs. Montgomery, 13 How. 498; The Thompson, 3 Wall. 155; The Dashing Wave, 5 Wall. 170; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 3 Wheat. 546. See Moore's Digest, 7;583-597.

[127]The Marianna Flora, 11 Wheat. 1, (1826); Murray vs. The Charming Betsey, 2 Cranch 64; The Buena Ventura vs. U. S. 175 U. S. 384; The Thompson, 3 Wall. 185; The Dashing Wave, 5 Wall. 170. See Moore's Digest, 7;598.

[128]The right of restoration has been derived from the Roman Jus Postliminii, although that applied to the rule whereby slaves and property on land returned to their former status after reconquest. See Hershey, op. cit., p. 439.

this subject assert that title to captured property vests, (1) immediately on seizure, (2) after twenty-four hours quiet possession, (3) after bringing "infra praesidia", (4) after condemnation by a prize court. All of these rules have been at different times acted on by courts and embodied in executive orders,[129] but the one at present established appears to be the last. The original owner's claim is good until the vessel has been condemned in an enemy prize court.[130] A statute of 1800,[131] continued by subsequent acts, required restoration to United States citizens where the property had not been condemned by competent authority, and to neutral subjects on a basis of reciprocity.[132] The neutral can make good his claim only where the law of his country would allow restoration to a citizen of the United States. In any case a deduction of military salvage for the recaptors is allowed before restoration.

The measures taken to enforce the duty of the United States as a belligerent to abstain from illegally interfering with neutral commerce are found in the rules laid down for the courts in treaties, statutes, and executive orders and instructions, but pri-

[129]Vesting of title immediately on seizure was held to be the rule of international law during the Revolutionary War, (see the Resolution, Fed. Ct. of App. 1781, 2 Dall. 1, 4; McDonough vs. Dannery and the Ship Mary Ford, 3 Dall. 188, 1796) thus the right of restoration was denied altogether except by way of comity or express ordinance. An ordinance of congress, (Nov. 25, 1775, Journ. Cong., Ford. ed., 3;373) granted restoration of recaptures made before twenty-four hours possession, but the court held this could not apply where the enemy had sold the prize to a neutral, and in any case it applied only to United States citizens (The Resolution, Fed. Court. of Appeals, 1781, 2 Dall. 1, 4). The twenty-four hour rule was also recognized in several early treaties as to neutrals, where the captor was a privateer, although restoration was permitted even after twenty-four hours possession and before condemnation when the captor was a public vessel. (See treaties with Netherlands, 1782-1795; Malloy, p. 1243; Sweden, 1783-1798, revived 1827, p. 1730; Prussia, 1785-1796; 1799-1810, arts. 17, 21, pp. 1482, 1492).

[130]Talbot vs. Seamans, 1 Cranch 1, (1801); Murray vs. The Charming Betsey, 2 Cranch 64, 121, (1804); The Star, 3 Wheat. 78, 86, (1818). Restoration even after condemnation has been allowed where the condemnation by the enemy prize court was clearly illegal. See The Resolution, 2 Dall. 1, (1781).

[131]Act. Mch. 3, 1800, 2 stat. 16, June 26, 1812, 2 stat. 760; June 27, 1813, 2 stat. 793; June 30, 1864, 13 stat. 306, 314; rev. stat. sec. 4652.

[132]The Schooner Adeline, 9 Cranch 244, see Moore's Digest, 7;521-533.

marily in the principles of law to which prize courts have habitually adhered. These principles to which American prize courts have professed obedience are (1) the principle that title does not pass until decree of a prize court, (2) the law applied by prize courts is the law of nations, (3) statutes and orders should be interpreted if possible so as not to conflict with international law, (4) treaties, including law making international conventions, are to be applied as part of the law of the land. So long as these principles are adhered to by discreet courts the national duties of this character will undoubtedly be fulfilled. Yet on account of the inevitable tendency of even the most conscientious judges to be swayed by national partisanship the establishment of the international prize court with a final jurisdiction in cases involving neutrals would be a most important addition to these sanctions of neutral rights. The United States has signed the international prize court convention and the senate has recommended ratification. The same is true of the Declaration of the London naval conference designed to serve as a law to be applied by that court. It has therefore done the most in its power to add this sanction also for the enforcement of its duties as a belligerent.

CHAPTER XII. OBLIGATIONS OF PREVENTION.

INTRODUCTORY.

A belligerent state while acting in that capacity is for the most part represented by its army and navy. The part of international law defining the obligations of belligerents to neutrals therefore consists to a considerable extent of rules of conduct for such agencies of government. The land and naval forces may be controlled by municipal law. The obligations of prevention require a state to exercise this control and prevent infractions of international law by its armed representatives.

With the theory of territorial state sovereignty, neutral states have a right, in war as well as in peace, to exclusive control of their territory.[1] As has been noted they are under an obligation to vindicate this right by interning armed forces of a belligerent violating their territory. The belligerent is under an equal obligation to respect this right by preventing such violations of neutral territory.

Although with a strict application of the theory of territorial sovereignty the state's interest in its citizens would vanish as soon as he leaves its frontiers, the actual law recognizes that states have a limited right to protect their citizens on the high seas and in foreign countries. Belligerents must respect this right and prevent injury to such persons and illegal destruction of their property. We may therefore classify the obligations here considered into those of preventing (1) violations of neutral territory, and (2) injury to neutral persons and property. Reserving this as a secondary classification, we will divide the obligations of prevention primarily into those relating to (1) acts by the land forces and (2) acts by naval forces.

ACTS BY LAND FORCES

The probability of land forces violating neutral territory or injuring neutral individuals is much less than in the case of naval forces, yet the United States has recognized by treaty the duty of preventing its land forces performing certain acts.

[1]For exceptions to this general statement see supra p. 45 et seq.

(1) By the Hague conventions,[2] a belligerent is forbidden to violate neutral territory by moving troops or convoys of military material across it, erecting wireless stations or other means of communication, or by recruiting corps of combatants thereon. It would therefore appear to be incumbent upon the United States to prevent its land forces performing any of these acts on neutral territory in time of war.

There appear to have been no cases of prosecution of army officers for violating neutral territory in time of war, but in an opinion of the judge advocate general in 1908[3] it was stated that the armed forces of the United States should not be permitted to penetrate neutral territory in the process of enforcing the neutrality laws. In the army regulations relating to garrison inspection the inspectors are required to see that the commanding officer is properly executing the laws relating to neutrality and the regulations concerning international courtesy, so far as applicable to his post.[4]

(2) The United States has recognized its duty to prevent the injury of neutral persons through seizure of property on land, in the Hague Conventions.[5] The general prohibitions relating to seizure of enemy property on land apply to neutrals in enemy territory, and special provisions are included requiring compensation in case railway material is requisitioned. By the principles of Anglo-American law the status of property depends upon its territorial location rather than the nationality of the owner; consequently neutral property on enemy territory is subject to the same consideration as enemy property in that situation.[6] This question will be more fully considered in deal-

[2]Hague Conventions, 1907, Malloy, p. 2297, v, Art. 1-3.

[3]Digest of Opinions of the Judge Advocates General of the Army, 1912, C. R. Howland, ed., p. 106.

[4]Army Regulations, 1913, sec. 889, p. 171-172.

[5]The Hague Conventions, v, Art. 19, Malloy, p. 2297.

[6]On the enemy character of the produce of enemy soil see, Thirty Hogshead of Sugar vs. Boyle, 9 Cranch 191, The Prize Cases, 2 Black 635, 671. On the enemy character of property of citizens or neutrals domiciled in enemy territory, see, Chester vs. The Experiment, Fed. Court of Appeals, 2 Dall. 41, (1787); U. S. vs. Gillies, Pet. C. C. 159; The Venus, 8 Cranch 253. (1814); The Frances, 8 Cranch, 335, 363, (1814); The Mary and Susan, 1 Wheat. 46; Rogers vs. Amado, 1 Newb. Adm. 400; The William Bagley, 5 Wall. 377; Gates vs. Goodloe, 101 U. S. 612; Mrs. Alexander's Cotton, 2 Wall. 404, 419. On the general subject see Moore's Digest, 7;424-434.

ing with the law of war. Suffice it to say here that the Instructions for the government of the armies[7] state, and the courts have reiterated[8] that private property cannot be seized on land except by requisition in case of necessity, unless an act of congress especially permits.

In a number of treaties the United States has agreed not to draft resident subjects of the other contracting power for military service in case of war.[9] With the exception of treaties relating to claims for injuries in specific cases,[10] these treaties appear to contain the only formal provisions imposing duties upon the United States in reference to the injury of persons of neutral states in land warfare. Whether or not a belligerent state is responsible for injuries received by aliens resident in its territory, due to the exercise of martial law, or the conduct of actual hostilities, is not altogether clear in international law.[11] Undoubtedly a state is bound to prevent its armed forces unnecessarily and wantonly injuring neutral residents,[12] but it seems clear that it is under no such duty when the actual prosecution of military movements creates a necessity.[13] The neutral alien assumes the risk of his residence. No statutes, regulations or official opinions of the military law of the United States appear to bear on this point, if we except the provisions relating to the usual exemption of enemy private property contained in

[7]Instructions for the government of the armies of the United States in the Feld, Art. 38; Printed in The Military Laws of the United States, 1911, p. 1079; Naval War College, International Law Discussions 1903, p. 122.

[8]Brown vs. U. S., 8 Cranch 110, (1814).

[9]Treaties with Argentine Republic, 1843, art. 10, Malloy, p. 23; Congo, 1891, art. 3, p. 329; Costa Rica, 1851, art. 9, p. 344; Dominican Republic, 1867-1868, art. 2, p. 404; France, 1788-1798, art. 14, p. 495; Hayti, 1864-1905, art. 8, p. 923; Honduras, 1864, art. 9, p. 955; Italy, 1871, art. 3, p. 970; Japan, 1894, art. 1, p. 1029; Mexico, 1831-1881, art. 9, p. 1088; Paraguay, 1859, art. 11, p. 1367; Servia, 1881, art. 4, p. 1703; Tonga, art. 9, p. 783; Two Sicilies, 1855-1861, art. 5, p. 1816; Venezuela, 1860-1870, art. 2, p. 1846.

[10]Treaty of Washington, with Great Britain, 1871, art. 12, Malloy, p. 705. The commission provided allowed Great Britain $1,929,819 for injuries to British subjects during the Civil war. See note Malloy, p. 705. Treaty with France, 1880, Malloy, p. 535. France was awarded $625,566.35 for injuries to her subjects during the Civil war. Malloy, p. 539.

[11]Moore's Digest, 6;883-926

[12]Moore's Digest, 6;918-922.

[13]Moore's Digest, 6;883-894.

Lieber's instructions.[14] Military commissions undoubtedly have a jurisdiction to punish acts forbidden by the treaties mentioned, but the protection of resident neutrals during war is largely left within the discretion of the president as commander in chief of the army, and subordinate military authorities with delegated powers.

(3) As the actual enforcement of the state's duties of prevention in relation to the army depends upon the method of control exercised, some attention may be given to this point.[15] The discipline of the army is to a large extent governed by formal rules, but these rules are to a considerable extent enforced by the discretionary authority of high military officers. In the field covered by constitutionally enacted congressional statutes, the army is bound beyond the authority of any executive or military officer to transcend, but in matters relating purely to the conduct of war it is doubtful whether congress has the power to control the army by statute.[16]

This does not, however, mean that the army is unregulated by law. It has a system of law of its own, known as military law, administered by its own officers and courts. The president as commander in chief has complete discretion as to the movements of the army except so far as limited by the constitution and acts of congress within the competence of that body.[17] While the president's authority is discretionary and may be altered at will, as a matter of fact it is exercised by means of more or less permanent regulations and instructions issued as general orders. These regulations have the force of law while operative,[18] and, together with statutes and constitutional provisions, their interpretations found in judicial decisions and

[14]Lieber's Instructions, art. 38, Military Laws, 1911, p. 1079.

[15]The statutory laws relating to the control of the army, annotated with references to court decisions and opinions of attorneys general and judge advocates general, may be found in The Military Laws of the United States, 1901, ed. by G. B. Davis, with a supplement to 1911, ed. by J. B. Porter. The Digest of Opinions of the Judge Advocates General of the Army, published in 1912, also contains references to statutes, cases and opinions of attorneys general bearing on the various points.

[16]On the independence of the president see Military Laws, 1911, p. 5 and notes. See Kendall vs. U. S. 12 Pet. 524, 610; Marbury vs. Madison, 1 Cranch 137, 166.

[17]Military Laws, 1911, p. 5, note 2.

[18]U. S. vs. Barrows, Fed. Cas. 14,529; Dig. of Op. of Judge Ad. Gen., 1912, p. 681.

opinions of attorneys general and judge advocates general form the body of military law.

Military law is enforced by executive action,[19] as in the power of promotion, demotion and discharge exercisable by superior military officers; by courts martial,[20] whose jurisdiction is defined by statute and extends only over statutory military offences, most of which are included in the Articles of War;[21] and by military commissions.[22] Military commissions administer military law by a procedure similar to courts martial, but they are not limited to the punishment of statutory offenses. They may take cognizance of acts contrary to the unwritten law of war or to military regulations.

The jurisdiction of both courts martial and military commissions is of an exclusively criminal character.[23] They decree punishments but do not award damages or reparation of any kind. Their jurisdiction, however, is not territorial.[24] It extends over offenses committed in foreign countries.

The statutory provisions, known as the Articles of War,[25] largely prescribe duties of enlisted men and officers[26] in relation to their military superiors and the performance of their military duties. Their aim is to enforce discipline in the army and they contain little matter referring to the law of war. Courts martial, being limited in jurisdiction to these offenses, cannot take cognizance of breaches of the unwritten law of war, including breaches of the army's obligations to neutral states and persons. The enforcement of these matters is in the hands of military commissions and their jurisdiction in time of war extends to

[19]Military Laws, 1911, p. 5, note 2.

[20]Digest of Op. of Judge Ad. Gen., 1912, pp. 510-513.

[21]Rev. Stat., sec. 1342-1343; Military Laws, 1911, pp. 962-1026. For historical account of development of articles of war; Military laws, 1911, p. 962.

[22]For history of development of military commissions see Dig. of Op. of Judge Ad. Gen. 1912, p. 1067. Use during Civil War, Ibid. p. 1071. Authority of, see Rev. Stat. 1343. Military Laws, 1911, p. 744, note 1, p. 745; Lieber's Instructions, art. 13, Military Laws, 1911, p. 1076; Dig. Op. Judge Ad. Gen., 1912, pp. 1067-1072.

[23]Dig. Op. Judge Ad. Gen., 1912, pp. 510, 1072.

[24]Dig. Op. Judge Ad. Gen., 1912, pp. 511, 1071.

[25]Rev. stat. sec. 1342-1343, Military Laws, 1911, pp. 962-1026.

[26]An exception may be noted in the jurisdiction given to courts martial over enemy spies, Rev. Stat. sec. 1343, Military Laws, 1911, p. 1026.

offenses committed by enlisted men or officers, civilians or enemies, contrary to military law or the law of war.[27]

It is therefore by executive action and the adjudication of military commissions that the duties of the army toward neutrals are enforced. The provisions of the treaties mentioned, and the general requirements of international law, as well as the rules specified in army regulations and instructions may be enforced by these authorities.

ACTS BY NAVAL FORCES

The naval forces of a belligerent are much more likely to infringe the rights of neutral states than land forces. With them therefore the duty of preventing such infractions has received more attention in the municipal law of the United States.

(1) By the Hague conventions[28] the United States has recognized the obligation to prevent its naval forces violating neutral territory by committing hostilities or setting up prize courts in neutral waters, using neutral territory as a base of operations or violating the usual rules of asylum.

As in the case of the army the action of naval commanders is largely regulated by executive control. There are, however, statutes dealing with the navy. The "Articles for the Government of the Navy of the United States"[29] specify certain acts as crimes and subject to the jurisdiction of courts martial. The only authority capable of inflicting punishment in the navy is commanders,[30] for minor offenses, and for more serious offenses, summary and general courts martial.[31] There are no courts in the navy similar to military commissions.

[27]On the distinction between the jurisdiction of military commissions and courts martial, see Lieber's Instructions, art. 13, Military Laws, 1911, p. 1076.

[28]Hague Conventions, 1907, xiii, art. 1, 4, 5, 12, 15-23. In thirty-two treaties with twenty-five countries the United States has been given the right of asylum for its war vessels in neutral ports, when necessary through "stress of weather, pursuit of pirates or enemies." The following are now in force: Bolivia, 1858, art. 9, Malloy, p. 117; Prussia, 1799-1810, revived 1828, art. 18, 19, p. 1492; Sweden, 1783-1798, revived 1816, 1827, art. 21, p. 1732. Such action does not constitute a violation of neutral territory even in the absence of treaty. Moore's Digest, 7;982-985.

[29]Rev. Stat. sec. 1624; Navy Regulations 1913, p. 15.

[30]Rev. Stat. sec. 1624, art. 24.

[31]Rev. Stat. sec. 1624, art. 22, 26, 38.

In addition to statutory provisions, the navy is governed by bodies of rules known as navy regulations and naval instructions which are promulgated by the president and have the force of law until repealed.[32]

No statutory provisions deal with violations of neutral territory, but regulations and instructions,[33] since the Revolutionary war, have enjoined officers to respect neutral rights and especially to refrain from hostilities in neutral territory. Thus by the Navy Regulations of 1913 commanders in chief are to "scrupulously respect the territorial authority of foreign civilized nations in amity with the United States."[34]

(2) The duty of preventing its naval forces injuring neutral individuals involves largely restraints which such forces are bound to observe in exercising the belligerent right of seizing neutral prizes on the high seas. The law applied by courts in enforcing the government's duty to abstain from illegally confiscating neutral prizes has been considered. Here we will consider the methods by which naval forces are prevented from making such seizures, or otherwise injuring neutral persons.

It must be observed that the acts prohibited in performing these duties of prevention and abstention are not exactly the same. The belligerent must prevent a prima facie unjustifiable seizure, but even when the seizure is justifiable the government may be bound to abstain from confiscating the prize. Thus it

[32]Regulations for the government of the Navy of the United States, Washington, 1913, under authority of Rev. Stat., sec. 1547.

[33]Naval Instructions, Apr. 3, 1776, Apr. 7, 1781, (Journ. Cong., Ford, ed., 4;253, 19;361); Aug. 28, 1812, (2 Wheat. App. 80, Moore's Digest, 7;545. Authority for the issuance of these orders was given in the prize act of 1812, 2 stat. 760, sec. 8. They were upheld in the Thomas Gibbons, 8 Cranch 421, (1814), but in the Mary and Susan, 1 Wheat. 46, 57, (1816) it was held that the captor must be notified of the order before his right to prize money from vessels, captured contrary to them, would be affected); May 14, 1846, (Br. and For. St. Pap., 34;1139, Moore's Digest, 7;828); Dec. 24, 1846, (Moore's Digest, 7;790); Nov. 6, 1861; May 14, 1862, (Upton, op. cit. p. 490); Aug. 18, 1862, (Official Records, Union and Confederate Navies, Ser. 1, 1;417, Moore's Digest, 7;700); June 20, 1898, (Gen. Ord., Navy Dept., 1898, No. 492, For. Rel., 1898, p. 780); Jan. 27, 1900, (Gen. Ord., Navy Dept., 1900, No. 551, revoked, *Ibid.*, Feb. 4, 1904, No. 150); Navy Regulations, 1913, sec. 1645, 1647.

[34]Navy Regulations, 1913, sec. 1645. Naval commanders are allowed some discretion under these rules. See note at head of chapter 15, Navy Regulations, 1913, p. 159r.

frequently happens that a naval officer will be held completely justified in making a seizure even though the prize after adjudication is restored to the neutral owner.[85]

It might be supposed that the means adopted to prevent illegal seizure of neutral property at sea would be a matter of purely national concern and would not be specified by international law. This is not the case. The exercise of belligerent rights over neutral commerce is so important and so subject to abuse that international law has to some extent specified the exact means which a state must provide for carrying out this obligation. Thus, it forbids captures by privateers, requires certain specified formalities of visit and search, and demands adjudication of the prize by a court acting in the usual form of judicial bodies. The belligerent state is of course at liberty to enact supplementary laws better to fulfill its duties under this head. Among such acts in force in the United States may be mentioned the statutes abolishing prize money, and those affixing criminal penalties for the spoliation of prizes. Before the abolition of privateering the requirement of bonds from privateers and the enforcement of liability against the owners of privateers were rules of this character. The abolition of privateering and the attempted abolition of prize money at the Second Hague conference are illustrations of the tendency of international law to enter more and more this field, formerly left to the discretion of states.

The United States has taken measures to prevent the illegal seizure of prizes by restricting the classes of vessels which may make seizures, by prescribing rules for visit and search of neutral vessels, and by affixing penalties for making unjustifiable seizures. An improper treatment of prizes and their crews is also prevented by municipal law. Definite rules for the conduct of prizes have been prescribed. Criminal penalties enforceable by court martial proceedings against persons in the navy violating these rules, as well as liability to civil suit for damages, add sanctions to their enforcement. Adjudication of prizes has also been provided for by the establishment of courts of prize jurisdiction. These matters will be considered in greater detail in the following sections dealing with the seizure of prizes, the care and treatment of prizes and the adjudication of prizes.

[85]The Marianna Flora, 11 Wheat. 1, (1826).

SEIZURE OF PRIZES

The United States has authorized seizures during war by three varieties of vessels, (1) privateers, (2) converted merchantment, (3) vessels of the navy.

(1) The use of privateers or private armed vessels in war was prohibited by the Declaration of Paris of 1856. The United States has not acceded to this declaration,[36] but refrained from using privateers during the Civil war,[37] and by proclamation at the outbreak of the Spanish war of 1898 disclaimed intention to use them during that war.[38] Privateers have not been extensively used since 1856 and it may safely be said that their use is now forbidden by international law.

The United States made free use of privateers in the Revolutionary war and the War of 1812. On these occasions efforts were made to prevent illegal seizures through rules of municipal law expressed in treaties, statutes, naval instructions and court decisions. Privateers were provided with commissions or letters of marque accompanied by special instructions stating the scope and limits of their right to seize property.[39] These commissions

[36]The United States did not accede to the Declaration of Paris because not having a navy it considered this type of naval militia necessary until the right to capture private property at sea should be abolished altogether. This complete exemption has been a tradition of American policy since earliest times. In a treaty with Bolivia, of 1858, it was reciprocally agreed to give asylum to privateers until the two parties should relinquish their use, "in consideration of the general relinquishment of the right of capture of private property upon the high seas," art. 9, Malloy, p. 117.

[37]On proposals to issue letters of marque during the Civil War and reasons for not doing so, see Moore's Digest, 7;556. An act of March 3, 1863, 12 stat. 758, gave the president authority to issue letters of marque.

[38]Proclamation, Apr. 26, 1898, 30 stat. 1770; Moore's Digest, 7;541.

[39]Privateers were authorized by a resolution of the Continental congress, March 23, 1776. On April 2 and 3, forms of commission were adopted to be sent in blank to the colonies. About 1700 letters of marque were issued during the Revolutionary war. See Allen, Naval History of the American Revolution, 1;451; 2;701. During the War of 1812, privateers were of great importance. In the Civil war the Confederate states issued letters of marque and an act of Mch. 3, 1863, authorized their issuance by the federal government. Regulations and instructions were drawn up on Mch. 20, 1863, but as a matter of policy no commissions were issued. See Moore's Digest, 7;556. See Resolutions of Congress, Mch. 23, 1776, Instructions Apr. 3, 1776, Apr. 17, 181, (Journ. Cong., Ford, ed., 4;230, 253, 19;361); Instructions, Aug. 28, 1812, (2 Wheat. App. 80) (Moore's Digest, 7;544). On necessity of carrying commissions see Upton, op. cit. p. 177.

could be declared forfeited at the discretion of the president.[40] By treaties[41] and statutes[42] privateers were required to furnish bond or other security for good behavior. An act of 1812[43] required privateers to keep a journal which was to be inspected by the commanders of naval vessels meeting the privateer at sea, prohibited cruising without special instructions, and declared prize money forfeited in case of illegal seizures. Courts have held the owners of privateers responsible for the conduct of the officers and crew of the vessel to the full value of property injured or destroyed.[44]

It should be noted, however, that an illegal act done by a privateer would not operate to invalidate the captures so far as the United States government was concerned. The captor might forfeit his prize money, bond and commission, but if the vessel were declared good prize by the court, the neutral owner would have no recourse. Thus a non-commissioned vessel,[45] or a vessel manned by a neutral or even an enemy crew[46] might make a capture, valid as against the belligerent or neutral owner, although the officers, crew and owners themselves might be subject to criminal punishment or civil liability.

(2) The use of converted merchant vessels in war was provided for in the mail subsidy act of 1891,[47] and a number of vessels of this character were used during the Spanish war.

[40]Act June 26, 1812, 2 stat. 760. See Upton, Op. cit., p. 181, 185; The Thomas Gibbons, 8 Cranch 421.

[41]Treaties with Great Britain, 1794-1807, art. 19, Malloy, p. 602; France, 1800-1809, art. 23, p. 504; Netherlands, 1782-1795, art. 14, p. 1238; Prussia, 1785-1796, art. 15, p. 1482; Sweden, 1783-1798, revived treaty of 1827, art. 16, p. 1730.

[42]Act July 9, 1798, 1 stat. 578; June 26, 1812, 2 stat. 760.

[43]Act June 26, 1812, 2 stat. 760; Instructions to privateers, Aug. 28, 1812, 2 Wheat. App. 80, Moore's Digest, 7;544.

[44]Del Col vs. Arnold, 3 Dall. 333, (1796). The liability of the owners was held to extend only to acts committed by the officers and crew in making captures in Davis vs. The Revenge, 3 Wash. 262. For acts done not in pursuance of the commission the owner was held not liable, see The Amiable Nancy, 1 Paine 11.

[45]The Joseph, 1 Gall. 545, Upton, op. cit. 178.

[46]The Mary and Susan, 1 Wheat. 46.

[47]Act March 3, 1891, 26 stat. 830, sec. 9. See also act July 17, 1862, 12 stat. 600, sec. 8, for recognition of "armed vessels in the service of the United States" distinct from either privateers or vessels of the navy, and The Rita, 69 Fed. Rep. 763. Moore's Digest, 7;538-543.

One of the Hague conventions of 1907[48] contains regulations for the use of such vessels, but it was not signed or ratified by the United States. The United States has always put converted merchantmen under the command of regular naval officers and subjected their crews to naval discipline. The measures taken to prevent violation of the rights of neutral persons by regular naval forces are therefore applicable to them.

(3) In a number of its early treaties the United States put itself under the obligation to prevent warships exercising the right of visit and search over vessels under neutral convoy,[49] or the right of search over vessels bearing a passport or sea letter of their country when neutral.[50] Specific requirements for conducting visit and search[51] were often included in these treaties and the right of action for damages received by the neutral individual from a United States warship or privateer[52] was frequently granted. The treaty requirement of bonds, ensuring the good behavior of privateers, has already been mentioned.[53]

According to the declaration of London vessels under neutral convoy are exempt from visit and search.[54] Illegal seizures are guarded against by the provision entitling the owner to compensation if his vessel was seized without sufficient reason and was subsequently released.

[48]Hague Conventions, 1907, vii.

[49]Respect for neutral convoy has been required in twenty-four treaties with nineteen countries, of which the following are in force: Bolivia, 1858, art. 23, p. 309; Colombia, 1846, art. 23, p. 309; Italy, 1871, art. 19, p. 975; Sweden, 1783-1798, revived 1816, 1827, art. 12, p. 1729.

[50]In most of the early treaties the carriage of sea letters was provided for in terms similar to that of the French treaty of 1778-1798, art. 24, 27, Malloy, pp. 477, 478. In some of them the carriage of such a passport was mandatory; a failure to produce it if not explained would result in condemnation as constructive enemy property. Supra, p. 161.

[51]As examples of treaty provisions prescribing method of conducting visit and search see treaties with Prussia, 1785-1796, art. 15, p. 1482; 1799-1810, art. 15, p. 1491; Sweden, 1783-1798, revived treaties 1816, 1827, art. 25, p. 1733.

[52]Treaties with France, 1778-1798, art. 15, p. 474; 1800-1809, art. 19, p. 504; Netherlands, 1782-1795, art. 13, p. 1237; Prussia, 1785-1796, art. 15, p. 1482; Sweden, 1783-1798, revived 1816, 1827, art. 15, p. 1730.

[53]Supra, p. 181, note 41.

[54]Declaration of London, 1909, art. 61, 64. On the status of the Declaration of London in 1914, see Am. Jour. Int. Law, 9;199, Jan. 1915.

In instructions issued to war vessels upon the outbreak of wars,[55] and in general naval regulations[56] and instructions,[57] methods of conducting visit and search and other duties of naval vessels toward neutral persons, required by treaty and international law, have been specifically enjoined.

The courts have held that the making of seizures without probable cause or proper authorization by law even when done under specific order of the president, as commander in chief of the navy, renders the captor liable to damages.[58] A seizure in violation of international law, however, when specifically authorized by municipal law, is permissible so far as the captor is concerned.[59] The only recourse in such cases is through diplomatic protest.

CARE AND TREATMENT OF PRIZES

A prize having been seized, five courses are open to the captor, (1) bringing in to home port for adjudication, (2) destruction, (3) ransom, (4) sequestration in a neutral port or sale in neutral territory, (5) release. The treatment which a neutral state has a right to expect under international law and the measures which the United States has taken to prevent its naval forces infringing those rights will now be considered.

(1) A number of early treaties[60] required the preservation of prizes intact until adjudication by a prize court, and the hospitable treatment of the officers and crew.

The Declaration of London[61] requires prizes to be brought to port for adjudication and forbids the destruction of either vessel

[55]Naval Instructions, Apr. 3, 1776, (Jour. Cong., Ford, ed., 4;253); Apr. 7, 1781, (Jour. Cong., Ford, ed., 19;361); Aug. 28, 1812, (2 Wheat. App. 80, Moore's Digest, 7;544); 1813, Special Instructions, (Am. St. Pap., Nav. Aff., 1;373, Moore's Digest, 7;516); May 14, 1846, (Br. and For. St. Pap., 34;1139); Dec. 24, 1846, (Moore's Digest, 7;790); May 14, 1862, (Upton, op. cit., p. 490); Aug. 18, 1862, (Rec. Union and Conf. Navies, Ser. 1, 1;417, Moore's Digest, 7;700); June 20, 1898, (For. Rel., 1898, p. 780).

[56]Navy Regulations, 1913, sec. 1634.

[57]Stockton's Naval War Code, 1900-1904, art. 30, 32, 33.

[58]Little vs. Barreme, 2 Cranch 170, (1804); The Thompson, 3 Wall. 155; The Dashing Wave, 5 Wall. 170; see also Moore's Digest, 7;593-598.

[59]La Maissonaire vs. Keating, 2 Gall. 334. See Upton, op. cit., p. 189.

[60]As an example see treaty with France, 1800-1809, art. 20, 21, Malloy, p. 503.

[61]Declaration of London, 1909, art. 48-54.

or cargo, unless the prize would be liable to condemnation and an attempt to bring it in for adjudication "would involve danger to the ship of war or to the success of the operation in which she is at the time engaged." If the prize is destroyed, persons on board and the ship's papers must be saved and the captor is declared liable to pay compensation if he cannot prove the existence of circumstances justifying destruction, irrespective of the validity of the capture. A decree of restitution of the vessel or part of its cargo in such a case involves compensation.

By the articles for the government of the navy,[62] punishment by death or other sentence of court martial is authorized to anyone destroying or injuring prizes or maltreating persons on board of them, and in the instructions for the navy issued on the outbreak of war, as well as in permanent instructions, rules for the care of prizes and their crew have generally been specified and their prompt bringing in required.[63]

The courts have declared that it is the captor's duty to bring prizes in for adjudication as soon as possible[64] and to deliver papers and necessary witnesses to the court.[65] Failure to perform these duties will result in damages to the neutral owner but it is only for "gross misconduct without excuse or palliation" that they may be had. "Much indulgence is extended to errors and even improprieties of captors when no malignity or cruelty is justly chargeable."[66]

(2) Special instructions to privateers and warships in the war of 1812[67] particularly advised destruction of prizes and this

[62]Resolution, Nov. 25, 1775, Journ. Cong., Ford, ed., 3;373; Act, Apr. 23, 1800, 2 stat. 52; July 17, 1862, 12 stat. 600; Rev. Stat. sec. 1624, art. 6, 11, 12. See other statutory provisions relating to the administration of prizes, Act, March 3, 1800, 1 stat. 16; June 26, 1812, 2 stat. 760; June 27, 1813, 2 stat. 793; March 25, 1862, 12 stat. 375; March 3, 1863, 12 stat. 759; June 30, 1864, 13 stat. 306; Rev. stat. sec. 4615-4617.

[63]Stockton's Naval War Code, 1900-1904, sec. 46, 47. Supra, note 57.

[64]The Lively, 1 Gall. 318; The Nassau, 4 Wall. 634; Moore's Digest, 7;630.

[65]The Diana, 2 Gall. 95; The Bothnea and the Jarnstoff, 2 Gall. 88.

[66]See Upton, op. cit. p. 200, citing, The Lively and Cargo, 1 Gall. 29; The Anne, 3 Wheat. 435; The George, 1 Mason, 24. On liability of captor for damages, see also, Slocum vs. Mayberry, 2 Wheat. 1; The Apollon, 9 Wheat. 362; The Neustra Senora de Regla, 108 U. S. 92, 103, (1882), and Moore's Digest, 7;630. Declaration of London, 1909, art. 52, 53.

[67]Special Instructions, 1813, Am. St. Pap., Navy Aff., 1;373; Moore's Digest, 7;516.

action was permitted by the instructions to blockading vessels in 1898,[68] and in Stockton's Naval War Code.[69] But in the last two cases bringing in was required unless there were "controlling reasons" for not doing so, such as "unseaworthiness, the existence of infectious diseases, lack of a prize crew," or imminent danger of recapture.

These provisions of statutes and executive orders indicate that the destruction of prizes is permitted under certain circumstances, but the practice has been discouraged except during the war of 1812. In discussions of the subject in the Naval War College in 1905 and 1907 the release of neutral prizes which could not be brought into port was recommended.[70]

(3) Ransom or the release of the prize by the captor on signature of a ransom bill generally accompanied by a hostage to insure payment is permitted by law in the United States. The

[68]Instructions to Blockading Vessels and Cruisers, June 20, 1898, For. Rel. 1898, p. 780, Moore's Digest, 7;518.

[69]Stockton's Naval War Code, art. 50; Moore's Digest, 7;526.

[70]Naval War College, International Law Discussions, 1905, pp. 62-76; 1907, p. 75. In these discussions a distinction is drawn between the destruction of neutral and enemy prizes, the former being forbidden. See also T. E. Holland, Neutral Duties in Maritime War, Proceedings British Academy, 2;12, quoted Moore's Digest, 7;521. International opinion generally condemns the destruction of neutral prizes and British courts have upheld this view. See The Zee Star, 4 Rob. 71; The Felicity, 2 Dods. 283; The Leucade, Spinks 221; W. E. Hall, International Law, 4th ed., p. 763; T. J. Lawrence, International Law, p. 405; L. Oppenheim, International Law, 2;469. Russian prize regulations of March 27, 1895, and Sept. 20, 1900, (For. Rel., 1904, pp. 735, 747, 752, Moore's Digest, 7;519) permitted destruction. A notable controversy arose from the destruction of the British vessel Knight Commander under these regulations in the Russo-Japanese War. The Russian prize court upheld this act. (Hurst and Bray, Russian and Japanese Prize Cases, 2 vol., London, 1912, 1;54; S. Takahashi, International Law applied to the Russo-Japanese War, N. Y. 1908, p. 310; Moore's Digest, 7;521). Destruction was permitted in exceptional cases by the Japanese Prize Regulations of March 15, 1904, art. 91 (Takahashi, op. cit. p. 788) and by the French Naval Instructions of July 25, 1870, (Snow cases, p. 577), and in certain cases of pressing necessity in the rules adopted by the Institute de Droit International. (Annuair de l'institut de droit international, 6;213, 221, 1882-1883, Moore's Digest, 7;526). The recent (1915) case of the William P. Frye, an American vessel destroyed by a German cruiser, was settled under the Prussian treaty of 1799, renewed in 1828, (art. 13, Malloy, p. 1490) which requires compensation to be made for all contraband goods destroyed.

prize money act of 1862[71] provided for the division of ransom money in the same manner as prize money, and in the case of Goodrich vs. Gordon[72] in the supreme court of New York, ransom bills were held to be good contracts enforceable in court.

(4) The sequestration and sale of prizes in neutral ports are practices which the United States as a neutral permitted France in the wars following the French Revolution.[73] Since that time the United States has opposed such practices, although according to treaties[74] and international law[75] it has permitted the temporary asylum of belligerent warships and their prizes.

In the Hague conventions of 1907[76] special provision was made for the sequestration of prizes in neutral ports pending adjudication in the belligerent's prize court, apparently with the hope of somewhat limiting the necessity of destroying prizes at sea. The United States did not ratify this section, thus maintaining its opposition to the principle of sequestration of prizes, which the American delegation spoke of as an "ancient abuse."[77] The Naval War College in a discussion of the subject in 1908[78] recommended against sequestration. Nevertheless the United States has resorted to sequestration in wars in which she has been a belligerent, and the courts have not hesitated to uphold their jurisdiction over prizes in neutral ports,[79] as well as over prizes

[71]Act, July 17, 1862, 12 stat. 600.

[72]Goodrich vs. Gordon, 15 Johns, 6, (1818) N. Y.

[73]Moore's Digest, 7;935-938.

[74]Treaties with France, 1778-1798, art. 17, Malloy, p. 474; 1800-1809, art. 24, p. 504; Great Britain, 1794-1807, art. 25, p. 604; Prussia, 1785-1796, art. 19, p. 1483; 1799-1810, revived 1828, p. 1493; Sweden, 1783-1799, revived 1816, 1827, art. 17, 19, p. 1732; Tripoli, 1805, art. 17, p. 1792; Algiers, 1795-1815, art. 10, p. 3; 1815-1830, art. 18, p. 8; Netherlands, 1782-1795, art. 5, p. 1245.

[75]Att. Gen. Cushing, 7 op. 122, (1855), Moore's Digest, 7;982-985. This applies at least to war vessels and their prizes. The privilege was often denied to privateers. See Cushing, 7 op. 122, (1855), Moore's Digest, 7;546. For opinion during the Revolutionary war see Allen, Naval History of the American Revolution, 1;255-257, 274; 2;537-538.

[76]Hague Conventions, 1907, xiii, art. 23.

[77]Report of United States Delegation, see Naval War College, International Law Situations, 1908, p. 76.

[78]Naval War College, International Law Situations, 1908, pp. 58-78.

[79]Jecker vs. Montgomery, 13 How. 512; The Arabella and The Madeira, 2 Gall. 368; Hudson vs. Guestier, 4 Cranch 293; Naval War College, International Law Situations. 1908, pp. 60-62.

which had been sold[80] or destroyed.[81] The sequestration of prizes in neutral ports seems to be permitted to naval vessels by law of the United States, although not looked upon with favor.

(5) Release of neutral prizes in preference to destruction was recommended by the naval war college in a discussion of 1907,[82] but this course would probably not be pursued except as a last resort.

The permission to accept ransom and sequestrate vessels in neutral ports, together with the strict injunction to bring prizes in for adjudication if possible, tends to prevent injury to neutral owners. The permission to destroy prizes, however, would have an opposite effect. The criminal penalties provided for illegal treatment of prizes as well as the rule giving action for damages in such cases are also measures directed toward the duties of prevention encumbent upon the country.

ADJUDICATION OF PRIZES

One of the most important measures taken by the United States to prevent infractions of neutral rights by its naval forces, is the establishment of prize courts with jurisdiction over all seizures by naval vessels. This means of prevention is regarded as so essential that it has become a rule of international law. The establishment of prize courts and the adjudication of prizes are duties which international law requires of belligerent states.

(1) In a large number of its treaties[83] the United States has reciprocally agreed as a belligerent to adjudicate prizes seized from the other contracting party, when neutral, in its prize court,

[80]Williams vs. Amroyd, 7 Cranch 423.

[81]The Edward Barnard, Blatch. 122; The Schooner Zavalla, Blatch. 173. See Naval War Col., Int. Law Sit., 1908, p. 63.

[82]Naval War College, International Law Discussions, 1907, p. 75. Release, where the prize can not be brought in for adjudication, is recommended by Lawrence, op. cit., p. 405; Hall, op. cit., p. 763. British courts have favored this rule in dicta, see The Zee Star, 4 Rob. 71; The Felicity, 2 Dods. 381; The Leucade, Spinks, 221, Bentwich 157, Moore's Digest, 7;522. Release of neutral prizes in certain cases was prescribed in the Japanese prize law of 1894, (art. 20, 22), but destruction was permitted in similar cases by the law of 1904, art. 91. See S. Takahashi, International Law applied to the Russo-Japanese War, New York, 1908, pp. 333-788, Moore's Digest, 7;525.

[83]Adjudication of prizes has been required in twenty treaties with fourteen countries, of which those with Bolivia (1858, art. 24, Malloy, p. 121) and Colombia (1846, art. 24, p. 309) are in force.

and to furnish a written statement of the reason for condemnation, on request. Statutes,[84] instructions to naval forces[85] and numerous decisions of prize courts[86] have also insisted on the necessity of a legal adjudication of prizes before passage of title or complete ousting of the right of the original neutral owner.

The United States has also recognized the duty of observing certain limitations in the establishment of its prize courts. Although France established prize courts in territory of the United States in the wars following the French revolution, the United States[87] never acknowledged its right to do so, and in the Hague conventions of 1907[88] it was provided that prize courts should not be set up on neutral territory or on a vessel in neutral waters. The courts have held that prize courts may be established in the country's jurisdiction or in occupied enemy territory.[89]

(2) The power to establish a prize court of appeal was given to congress in the Articles of Confederation and also the power to "establish rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated." The court, consisting of a committee of congress established under this authority by the continental congress,[90] had simply appellate jurisdiction over state courts

[84]Rev. Stat. sec. 4615-4617.

[85]Instructions, June 20, 1898, art. 20-23, For. Rel. 1898, p. 781; Moore's Digest, 7;514; Stockton's Naval War Code, 1900-1904, art. 46-50.

[86]The Dos Hermanos, 2 Wheat. 76; The Pizarro, 2 Wheat. 227; The Adventure, 8 Cranch 221, (1814); Grundy Att. Gen., 3 op. 377, (1838), The Nassau, 4 Wall, 634; Moore's Digest, 7;623-631.

[87]See Fenwick, The Neutrality Laws of the United States, p. 18. At the time of the Revolutionary war it was common to take prizes into neutral ports where they were adjudicated by the local courts of admiralty, although it was even then regarded as an act approaching a breach of neutral duty. The United States on several occasions took prizes into French and Spanish ports. See G. W. Allen, A Naval History of the American Revolution, N. Y., 1913, 1;255,274: 2;537,538.

[88]Hague Conventions, 1907, xiii, art. 4, Malloy, p. 2359.

[89]The Grapeshot, 9 Wall. 129. The authority of the president as commander in chief to establish prize courts in conquered territory was upheld in the Grapeshot but denied in Jecker vs. Montgomery, 13 How. 498, which held that Congress alone could create courts with a prize jurisdiction. See Moore's Digest, 7;585.

[90]Articles of Confederation, art.. 9; Resolution of Nov. 25, 1775, sec. 6, Jour. Cong. 1:242, Ford. ed. 3;373. See note on these courts with references, Scott 10..

of admiralty, the establishment of which with a prize jurisdiction was recommended to the colonial legislatures by a resolution of congress.[91]

By the constitution the judicial power of the United States is declared to extend over "all cases of admiralty and maritime jurisdiction." By the judiciary act of 1789 the jurisdiction of the federal courts over prizes has been made exclusive,[92] thereby barring any possible jurisdiction in state courts, and original jurisdiction in prize causes has been given exclusively to federal district courts,[93] thus limiting higher federal courts including the supreme court to appellate jurisdiction in such cases. The prize jurisdiction of district courts is complete, including all matters relating to the disposition of vessels seized jure belli, or by authority of statutes such as embargo, non-intercourse and revenue acts. The admiralty jurisdiction, both instance and prize, exists constantly, and no specific commission on the outbreak of war is necessary for the exercise of prize jurisdiction;[94] thus when the

[91]Resolution of Nov. 25, 1775, sec. 4-6, Jour. Cong. 1;242, Ford. ed. 3;373. See Moore's Digest, 7;585. Before the passage of this resolution, on Nov. 1, 1775, the general court of Massachusetts had established prize courts, the first ever erected by an independent state in the western hemisphere. See Acts and Resolutions of Province of Massachusetts Bay, 1886, 5;436.

[92]Act. Sept. 24, 1789, 1 stat. 76,, sec. 9; rev. stat., sec. 711, cl. 3, 4; Judicial code, 1911, act March 3, 1911, 36 stat. 1087, sec. 256, cl. 4. The admiralty jurisdiction of which prize jurisdiction is a part was held to be exclusive in federal courts in The Hine vs. Trevor, 4 Wall. 555; The Belfast, 7 Wall. 625.

[93]Act Sept. 24, 1789, 1 stat. 76, sec. 9; rev. stat., sec. 563, cl. 8; Judicial code of 1911, 36 stat. 1087, sec. 24, cl. 3. See Ketland vs. The Cassius, 2 Dall. 365, (1796).

[94]Prize jurisdiction may have been originally inherent in courts of admiralty in England, but it was quite early recognized as distinct from the instance jurisdiction and as exercisable only under special commission, see Lindo vs. Rodney, 2 Doug. 614, (1781) W. S. Holdsworth, A History of English Law, 3 Vol., London, 1907, 1;330. By the naval prize act of 1864, (27-28 Vict. c 25, sec. 4) a permanent prize jurisdiction was given to the High Court of admiralty, which was vested in the High Court by the Judicature act of 1873, (36-37 Vict. c. 66, sec. 4-18). By the Prize courts act of 1894, (57-58 Vict. c. 39), commissions giving a prize jurisdiction to vice-admiralty courts might be issued in time of peace to become effective by the outbreak of war. See, The Earl of Halsbury, ed., The Laws of England, 27 vol., London, 1912, 23;285, Pitt Cobbett, Cases and Opinions on International Law, 3rd. ed., 2 vols., London, 1909, 2;190.

country is neutral the jurisdiction may be exercised over vessels violating neutrality, and in times of peace over vessels of pirates and unrecognized insurgents committing depradations against commerce.[95]

(3) By the international prize court convention of the second Hague conference, ratification of which with an amending protocol was recommended by the senate on February 15, 1911,[96] the United States has consented to submit to the decision of the international prize court in certain prize cases arising in wars in which all of the belligerents are parties to the convention. By the protocol[97] proposed by the United States in 1910 on account of the constitutional impossibility of an appellate authority above the supreme court, it is provided that an original action for damages against the captors may be brought in the international prize court. Technically therefore in the case of the United States the international prize court would not have jurisdiction to determine the validity of the title to prizes, but the effect of the decision would be the same. The international prize court has not been established up to date.

The convention provides that in deciding cases the court is to be governed by treaties if any bear on the controversy, by international law if settled or in the absence of either by "general principles of justice and equity." On account of this somewhat vague description of the law to be applied the London Naval Conference of 1909 was called to draw up a code of prize law. Owing to the failure of the Declaration of London, proposed by this conference to secure general ratification, no immediate prospect of the establishment of the court is in view.[98] The firm establishment of such an international court would undoubtedly be a most potent agency for preventing injury to neutral persons by belligerent naval forces.

(4) Prize jurisdiction is ordinarily exclusive in the courts of the country of the capturing belligerent power.[99] It is essen-

[95]Glass vs. The Betsey, 3 Dall. 6, (1794). Supra p. 33 et seq., 131 et seq.

[96]Hague Conventions, 1907, xii, Charles, Treaties, 1913, p. 248.

[97]Charles, Treaties, 1913, p. 262.

[98]On the status of the Declaration of London in 1914 see Editorial comment, Am. Jour. Int. Law, 9;199, Jan. 1915.

[99]L'Invincible, 1 Wheat. 238, 261; The Estrella, 4 Wheat. 298; U. S. vs. Peters, 3 Dall. 121, (1795). In a number of treaties to which the United States is a party, it is provided that prizes of either party when belligerent shall be exempt from the jurisdiction of the other when tem-

tially a jurisdiction in rem, extending over seizures jure belli from neutrals or enemies upon the high seas or in territorial waters within the admiralty jurisdiction.[100] Actual possession of the vessel in question, however, is not necessary. The jurisdiction may be exercised over a vessel sequestrated in a neutral port,[101] sold,[102] ransomed,[103] or sunk,[104] and according to law a decision must be given in all of these cases before the seizure and disposition of the prize can be regarded as legitimate. The ordinary case is where the vessel has been brought into port and has been put according to a provision of statute into the custody of an officer of the court.

Seizures of foreign vessels made in pursuance of local regulations such as the embargo and non-intercourse acts are legitimate only when made in the territorial jurisdiction of the United States, but subject to this limitation are treated in the same manner as prizes jure belli.[105] The same is true of vessels violating the neutrality of the United States. They also may only be seized in territorial waters.[106] The seizure of pirate vessels,[107] vessels of unrecognized insurgents committing depredations on commerce[108] and vessels engaged in acts internationally condemned, as the slave trade,[109] is permitted on the high seas

porarily taken into its ports. Supra, p. 186, note 74. For exceptions to the exclusive jurisdiction of the captor power's courts over prizes see Moore's Digest, 7;592. Supra, p. 134 et seq.

[100]Schooner Adeline, 9 Cranch 244, Speed, Att. Gen., 11 op. 445, (1866); Note on prize law, 1 Wheat. App. II; 2 Wheat. App. I; 5 Wheat. App. p. 52.

[101]Jecker vs. Montgomery, 13 How. 498; The Advocate, Blatch. 142; The Arrabella and the Madiera, 2 Gall. 368.

[102]Williams vs. Amroyd, 7 Cranch 423, (1819).

[103]Maissonaire vs. Keating, 2 Gall. 324, 337, (1815); Miller vs. The Resolution, 2 Dall. 1, 15, (1781). See Moore's Digest, 7;533.

[104]The Edward Barnard, Blatch, 122; The Schooner Zavalla, Blatch, 173. See also Moore's Digest, 7;590.

[105]Rose vs. Himeley, 4 Cranch, 241, (1808); Gelston vs. Hoyt, 3 Wheat. 246.

[106]The Estrella, 4 Wheat. 298, (1819); The Alerta, 9 Cranch 359, (1815).

[107]The Ambrose Light, 25 Fed. Rep. 408, (1885).

[108]The Three Friends, 166 U. S. 1, (1897); The Ambrose Light, 25 Fed. Rep. 408. (1885).

[109]General act for the Repression of the African Slave Trade, 1890, Malloy, p. 1964. In the Antelope, 10 Wheat. 66, 122, (1825) Chief Justice Marshall denied the legitimacy of seizures for slave trading beyond territorial jurisdiction in the absence of treaty.

by countries at peace and in such cases the United States courts exercise a prize jurisdiction. It should be noted that statutes may confer a jurisdiction over seizures on the high seas not recognized or permitted by international law, and the prize courts are bound to exercise it.[110]

In order to confer a prize jurisdiction the seizure must be on the high seas or in territorial waters within the admiralty jurisdiction. Seizures on land confer no prize jurisdiction in the United States.[111]

Although prize jurisdiction is essentially a jurisdiction in rem, the duty of the court being to settle the title to the vessel itself and its cargo, yet it is not entirely so. Incidental to the disposition of the prize, claims for damages may arise, and it may be necessary to determine the rights of claimants for freight, liens, insurance, etc. All of these matters come within the jurisdiction of prize courts of the United States.[112]

(5) The functions of prize courts are (a) to determine upon the legality of seizures, (b) to determine the title to prizes and (c) to dispose of the proceeds in case of condemnation.

By their authority to decide whether the seizure was justifiable, and in case it was without probable cause to decree damages against the naval officers making it, prize courts may aid in the prevention of injury to neutral persons by such officers.

In determining the title to the prize, the court adjudicates the respective claims of the belligerent government to condemnation and the neutral owner to restitution. It thus enforces the duty of the government to abstain from illegal confiscation of neutral property. In disposing of the proceeds of condemned prizes the court may further prevent infractions of neutral rights by naval forces.

The law applied by prize courts of the United States in

[110]The Amy Warwick, 2 Sprague 123; Murray vs. The Charming Betsey, 2 Cranch 64; Talbot vs. Seaman, 1 Cranch 1; Moore's Digest, 2;914. In the absence of statute the jurisdiction of prize courts is determined by international law. The Schooner Adeline, 9 Cranch 244, Moore's Digest, 7;599. In reference to British claims to prize jurisdiction over extraterritorial seizures of foreign vessels in suppressing the slave trade see supra p. 35.

[111]Brown. vs. U. S., 8 Cranch 110, (1814). In England prize courts were given jurisdiction over booty seized by land forces by statute in 1840, 3-4 Vict. c. 55, sec. 22; Banda and Kirwee Booty, L. R. 1 Adm. and Ecc., 109, (1866).

[112]Moore's Digest, 7;593-603, Infra p. 193, note 13.

decreeing distribution of the proceeds of prizes will now be considered.

(6) Claimants to proceeds of prizes may be of two kinds, (1) persons with equitable claims upon the vessel by contract or ordinary principles of the law of admiralty, such as claims for freight, liens, insurance, etc. The prize courts of the United States have in general recognized the validity of such claims upon neutral prizes and their jurisdiction over them; consequently in case of condemnation of the vessel, such claims have been commonly allowed before any part of the proceeds is decreed to the government.[113] (2) Persons with claims for meritorious service in capturing the vessel. These claims may be of two kinds, (a) where the vessel is condemned to the capturing state, and (b) where a recaptured vessel is restored to its original neutral or citizen owner. In the first case the claim is for prize bounty or prize money, in the second for military salvage.

(a) It is a principle firmly established in Anglo-American jurisprudence, if not universal, that prizes legally condemned enure primarily to the government.[114]

[113]The Societe, 9 Cranch 209, 212, (1815); The Antonia Johanna, 1 Wheat. 159, (1816); Schwartz vs. Insurance Co. of No. Am. 3 Wash. C. C. 117. In the case of enemy prizes the opposite rule appears to prevail, that capture destroys all previous claims. See The Hampton, 5 Wall 372; The Carlos F. Roses, 177 U. S. 655; The Frances, 8 Cranch 418, (1814); See Moore's Digest, 7;600-603.

[114]This principle which is signified by the phrase, "Bello parta cedunt republicae," appears to have been recognized by the Greeks and Romans. "Whatever is captured from the enemy, the law directs to be public property, so that not only private persons are not the owners of it, but even the general is not. The questor takes it, sells it and carries the money to the public account." Cited from Dionysius of Halicarnassus by Grotius, De Jure Belli ac Pacis, (1625), Whewell, ed., 3 vols. Cambridge, 3;124. See also, A. S. Hershey, The History of International Relations during Antiquity and the Middle Ages, Am. Jour. Int. Law, 5;915, (1911); Coleman Philipson, The International Law and Custom of Ancient Greece and Rome, 2 vols., London, 1911, 2;237, 381. For opinion of Grotius on this subject, see op. cit., 3;105. For recognition of this principle in England in 1342 A. D., see Rymer, Foedera, 20 vol., London, 1704-1735, 1;408; Robert Phillimore, Commentaries on International Law, 3rd ed., 4 vols., London, 1885, 3;601; T. E. Holland, Principles of Jurisprudence, 11th ed., N. Y., 1910, p. 212; Alexander vs. Duke of Wellington, 2 Russ. and Mylne 54, (1831); The Elsebe, 5 Rob. 173, (1804); Banda and Kirwee Booty, L. R. 1 Adm. and Ecc. 109, (1866). Recognition of this principle

In the Revolutionary war, by resolution of congress,[115] prizes were given to the captors entirely if privateers, and one-third to one-half if public vessels. By an act of 1800[116] the whole of the proceeds of prizes captured by public vessels was decreed to the captor when of inferior force to the prize, and one-half the proceeds when of superior force. The act also provided for distribution among the vessels within sight as joint captors, and among the officers and men of the vessels. The whole of prize proceeds was given to privateers and by an act of 1812[117] distribution was decreed to be according to contract between owners and crew or in the absence of contract one-half to each. The provisions of the act of 1800 were practically repeated in acts passed during the Civil war[118] which applied

in the United States, U. S. vs. The Schooner Peggy, 1 Cranch 103; The Siren, 13 Wall. 389; Porter vs. U. S. 106 U. S. 607; Commodore Stewart's case 1, Ct. Cl. 113, Scott, 910; The Nuestra Senora de Regla, 108 U. S. 92, 101, (1882); The Manila Prize Cases, 188 U. S. 254. In the Palmyra, 12 Wheat. 1, the court held that all proceedings for condemnation upon captures should be in the name of the United States. Before the abolition of prize money the courts frequently referred to the vesting of prize in "captors" in an ambiguous manner which made it appear that title was transferred immediately from the original owner to the naval force which made the capture. (The Mary and Susan, 1 Wheat. 46). The difficulty comes through the equivocal use of the word "captors" to mean either the capturing state or the individuals of the capturing naval force. When the question has come up directly the court has invariably held that condemnation is always to the government and the actual captors only have rights by reason of explicit grant by the government. Thus an article in the French treaty of 1800 (art. 4, Malloy, p. 497), providing for the restoration of prizes not definitely condemned, but legally captured, was held to violate no vested rights of the captors, (U. S. vs. the Schooner Peggy, 1 Cranch 103, Lincoln Att. Gen. 1 op. 111), and during the Spanish war of 1898 the president released several captured vessels before adjudication without compensation to the captors for their loss of prize money, (Moore's Digest, 7;505; The Manila Prize Cases, 188 U. S. 254).

[115]Resolution of Congress, Nov. 25, 1775, Journal of Cong. 1;242, Ford. ed. 3;373. See Moore's Digest, 7;264. Henderson vs. Clarkson, Supreme court of Pa., 2 Dall. 174. (1792); Keane vs. the Brig Gloucester, 2 Dall. 36, (1782), Fed. Court of Appeals.

[116]Act. Apr. 23, 1800, 2 stat. 52, sec. 5-7, see Upton, op. cit. p. 484.

[117]Act. June 26, 1812, 2 stat. 760, sec. 4; June 27, 1813 2 stat. 793, See Upton, op. cit., p. 485.

[118]Act March 25, 1862, 12 stat. 375; July 17, 1862, 12 stat. 600; June 30, 1864, 13 stat. 306, 314, Rev. Stat., sec. 4630, 4632, 4635, 4642, 4652, Upton, op. cit., p. 489.

to both vessels of the navy and "not of the navy". Provision was also made for the payment of prize bounty of $100 for each man on board an enemy warship sunk or destroyed in battle if of inferior force to the attacking United States vessel and $200 if of superior force. Ransom money, salvage, and prize bounty were all to be distributed in the same proportions as prize money. There have been numerous special acts by congress giving prize money in particular cases where the prize was sunk or recaptured, and consequently no claim could be prosecuted under the general law.[119]

The courts have held that as the statutes make no provision for prize money in case of capture by land forces or jointly by land and naval forces, in such cases the entire proceeds enure to the government.[120] While non-commissioned captors are legally entitled to no prize money, "it has been the practice to compensate gratuitous enterprise, courage and patriotism, by assigning the captors a part and sometimes the whole of prize" according to Attorney General Wirt.[121] By an act of March 3, 1899[122] all provisions granting prize money and prize bounty were repealed; thus the entire proceeds of prize now enure to the government, and are according to the act of 1862[123] to be used as a permanent naval pension fund.

(b) In early treaties with the Netherlands, Sweden and Prussia[124] it was reciprocally agreed that where either of the contracting parties recaptured a vessel of the other before twenty-four hours enemy possession, the vessel should be restored with one-third salvage to privateers and one-thirtieth to public vessels. If the enemy had had possession more than twenty-four hours, privateers were permitted to retain the en-

[119]Special acts granting prize money, Victory on Lake Erie, 3 stat. 130; Case of Algerine vessels, 3 stat. 315; Crew of Brig Transfer, 3 stat. 480; Crew of the Black Snake, 4 stat. 23; Crew of the Bon Homme Richard and the Alliance, 5 stat. 158; Crew of the Wasp, 3 stat. 295.

[120]The Siren, 13 Wall. 389; The Nuestra Senora de Regla, 108 U. S. 92, 101, (1882).

[121]Wirt, Att. Gen., 1 op. 463, (1821). See The Dos Hermanos, 2 Wheat. 77. Decisions involving prize money distribution in the Spanish War, Dewey vs. U. S., 178 U. S. 510; The Manila Prize Cases, 188 U. S. 254; The Mangrove Prize Money, 188 U. S. 720.

[122]Act March 3, 1899, 30 stat. 1004, 1007.

[123]Act July 17, 1862, 12 stat. 600, sec. 11.

[124]Treaties with Netherlands, 1782-1795, Malloy, p. 1243; Sweden, 1783-1798, revived 1816, 1827, art. 17, 18, p. 1730; Prussia, 1785-1786, art. 17, 21; 1799-1810, art. 17, 21, pp. 1482, 1492.

tire proceeds while with public vessels the prize should be restored with one-tenth salvage. A statute of 1800,[125] substantially embodied in the revised statutes of 1878, decrees salvage of one-eighth to the recaptors upon restoration of vessels to the original owner. The principle upon which restoration or condemnation is decreed in cases of recaptured vessels has been considered under obligations of abstention.[126]

The methods adopted for enforcing the obligations of naval forces, have been (1) punishment by court martial for violation of articles for the government of the navy, (2) assessment of damages by prize courts, (3) forfeiture of prize money. In addition to these legal methods of control the conduct of naval forces can be and is ordinarily controlled by executive action exercisable by the president as commander in chief and subordinate naval officers with delegated authority. The abolition of prize money has also been a measure tending toward the protection of neutral rights. The abolition of privateering with the stimulus which it gave toward disregard for the rights of merchantmen, by offering chances for personal gain, has called attention to the fact that prize money created a similar situation in the navy itself. There can be no doubt but that the quest of prize money acts as an incentive to the making of unjustifiable seizures,[127] and when it was allowed its forfeiture in case of unwarranted seizures was used as a means of enforcing observance of neutral rights among naval vessels. By the abolition of prize money and prize bounty the incentive toward illegal captures has been removed and the movement in the direction started by the abolition of privateering continued.

In the second Hague Conference of 1907, a proposal was made to abolish prize money,[128] which was still given by all nations except the United States and Japan. It was not accepted, even the United States voting against it on the ground

[125]Act March 3, 1800, 2 stat. 16. The Act June 30, 1864, 13 stat. 306, 314, Rev. Stat. sec. 4652, leaves the determination of the amount of salvage to the court.

[126]Supra, pp. 169 et seq.

[127]See Article by C. C. Binney, The latest chapter of the American Law of Prize and Capture, Am. Law Reg., Sept. 1906, and Editorial Comment, Am. Jour. Int. Law, 1907, 1;484.

[128]Deuxième Conference Internationale de la Paix, Actes et Documents, 3 vols., The Hague, 1907, 3;1148. English translation of this proposal, J. Westlake, International Law, 2 vols., Cambridge, 1910, 2;313. Discussion of the "voeu" which was proposed by the French delegation, in the Acts and Documents, 3;792, 809, 842, 845, 906, 909.

that the matter was a subject proper for local regulation and that it was not desirable to take emphasis from the broader question of abolishing the right to capture private property at sea which the United States was advocating. In the present war, Great Britain has by order in council abolished prize money,[129] and it seems probable that in course of time it will be acted on internationally as was done in the case of privateering.

[129]Order in Council, Aug. 28, 1914, abolished prize money and established a prize fund to be divided among the whole navy at the end of the war. See Norman Bentwich, International Law as applied by England in the War, Am. Jour. Int. Law, Jan. 1915.

PART IV. OBLIGATIONS AS A BELLIGERENT TOWARD ENEMIES

CHAPTER XIII. INTRODUCTORY

In their dealings with neutral states, the rights of belligerent states are much in excess of the ordinary rights of states at peace. This is even more true in their dealings with enemies. The recognized rights of a belligerent against its enemy are so great that it sometimes seems impossible to define their limits at all. Yet the establishment of these limits is the purpose of the law of war. As soon as we recognize the existence of such limits to legal rights, we recognize the legal obligations not to exceed them. It is therefore possible to speak of the obligations of a belligerent to its enemy.

The obligations of states have been classified under the five heads, (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5), reparation.

(1) Obligations of abstention can be made effective, for the most part, only by act of the sovereign authority of the state. In so far as this is true, municipal law can have no effect in their enforcement. As in the case of obligations of belligerents toward neutrals, the practice of prize courts does furnish a check upon the infraction of some of these duties. By legally adjudicating enemy property captured at sea according to the rules of international law, prize courts interpose between their own government and the enemy owner of the prize, thus compelling observance of the belligerent duty to abstain from confiscation of enemy property declared immune by international law. In this case, therefore, municipal law may aid in the enforcement of the belligerent's obligations of abstention.

(2) Acquiescence seems to be contradictory to the very nature of war. Non-acquiescence, the effort to overcome, appears to be the very essence of the relationship between belligerents. This is true so far as the belligerent state itself is concerned, but the duty of acquiescence is recognized as obligatory upon the non-combatant inhabitants of occupied territory. This duty obviously can

not be enforced by the belligerent state claiming de jure sovereignty of the territory, but by the occupying belligerent who has de facto sovereignty. The law of the United States does, however, recognize the duty, in that it enforces ordinary commercial acts of individuals, not of direct aid to the enemy, which were performed in pursuance of this duty of acquiescence, even when contrary to the law of the United States.[1] This duty, however, relates to the general subject of the succession of states and the rights of inhabitants of transferred territory which is considered in the chapters dealing with obligations in time of peace.[2]

(3) The obligations of prevention require a state to prevent certain acts by its officers of government and the inhabitants of its territory which would amount to infractions of international law. It is by enforcing these duties that municipal law can be most effective in enforcing international obligations. The belligerent state comes in contact with its enemy largely through its army and navy. Through municipal regulations preventing infractions of international law by such agencies, this obligation of international law may be made effective.

(4) Vindication, however, is foreign to the law of war. International law does not put a belligerent under an obligation to vindicate illegal acts by its enemy. It does, however, give him a right to retaliate to a limited extent. Retaliation is a *right* to vindicate, not a *duty*. The belligerent is, however, under an obligation not to carry retaliation beyond a certain limit.[3] The limit is not fixed or enforceable by any authority. The legitimacy of any particular measure of retaliation is left to the discretion of the sovereign. Municipal law can not control it.[4]

(5) Reparation should also theoretically be a duty of belligerents. Individuals of either belligerent state ought to be able to recover compensation for injuries due to illegal acts of the enemy state. In practice such a condition is impossible. The victor will

[1]Thorington vs. Smith, 8 Wall. 1, (1868).

[2]Supra, pp. 62-63.

[3]The right of retaliation is recognized in Lieber's Instructions, art. 27, 28.

[4]It should be said, however, that there has been authority in British prize court decisions for the view that courts may refuse to recognize retaliatory measures of their own government so far as they injuriously affect neutrals. See The Recovery, 6 Rob. 348, (1807); The Minerva, (1807) Life of Sir J. Mackintosh, 1:317; Phillimore, Int. Law, 3; section 436; Holland, Studies in Int. Law, pp. 197-198.

gain full reparation in the treaty of peace, but there is no legal recourse for the loser. The treaty of peace definitively settles the matter, and its terms are fixed according to policy and the result of the conflict. There have, however, been treaties requiring each party to indemnify the other for the care of its prisoners of war, specifically stating that this indemnity shall be considered entirely apart from general indemnities demanded by the conqueror. The Hague conventions also require compensation for breaches of the law of war.[5] So far as such treaties are enforceable by municipal law, and so far as enemy individuals are assisted by municipal law in obtaining indemnity for injuries, the general rules of the subject of reparation considered under the law of peace will apply.

We shall therefore consider the duties of belligerents toward their enemies under the two heads, (1) obligations of abstention, and (2) obligations of prevention. In the enforcement of the former class of duties, municipal law enforces international law directly. The rules of municipal law bearing on this point are therefore rules of international law at the same time. In the second case, the means employed for controlling the conduct of persons and officers are a matter left to the discretion of the governments. International law does not say how individuals shall be controlled, only what they must be prevented from doing. The municipal law in this class will therefore consist largely of rules supplementary to international law.

[5]Treaties with Prussia, 1785-1796, art. 24, Malloy, p. 1484; 1799-1810, revived 1828, art. 24, p. 1494; Mexico, 1848, art. 22, p. 1118; Hague Conventions, 1907, iv, art. 3.

CHAPTER XIV. OBLIGATONS OF ABSTENTION

INTRODUCTORY

A belligerent state is bound to abstain from certain acts toward its enemy. Thus it must abstain from committing hostilities until formal warning of war, from the confiscation of public or private debts, from committing acts of hostility against enemy persons domiciled in its territory, from resorting to forbidden methods of warfare, from the inhuman treatment of prisoners of war, from the unnecessary injury of non-combatants, from injuring the sick and wounded and those caring for them, and from injuring scientific, religious and artistic institutions.[1] These duties, however, are obligatory upon the sovereignty of the state. They are beyond the province of municipal law to control, so far as they are duties of abstention. Thus courts have held[2] that the commencement of war is a political act and they can not question the legitimacy of belligerent measures when the political department of government has recognized the existence of the status. Thus the Hague convention relating to the opening of hostilities must be regarded as directory solely upon the political department of government.

The courts also have held[3] that the sovereign may confiscate debts and if it does so unequivocally the courts can offer no recourse to the mulcted enemy person. This statement, however, is subject to limitation. Unequivocal confiscations of the sovereign are undoubtedly valid in municipal law. Confiscations by particular agencies of government may not be. Thus during the Revolutionary war the confiscations by the individual commonwealths were declared void where they conflicted with treaty provisions.[4] The enforcement of the duty as against inferior agen-

[1]Hague Conventions, 1907, iii, iv, vi, Malloy Treaties, pp. 2259, 2269, 2304.

[2]The Prize Cases, 2 Black 635.

[3]Brown vs. U. S., 8 Cranch 110, (1814); Ware vs. Hylton, 3 Dall. 199, (1796).

[4]Ware vs. Hylton, 3 Dall. 199, (1796). See treaty with Great Britain, 1783, art. 4-6, Malloy, p. 588. The United States has concluded twenty treaties with fifteen countries, six of which are now in force (1915) forbidding confiscation of public or private debts due enemy persons during war.

cies of government, however, should be classified under duties of prevention rather than of abstention.

By a large number of treaties[5] the United States has recognized its duty to protect enemy persons domiciled in its territory and to permit them a certain time to wind up their affairs and leave. These treaties also are addressed primarily to the political department of the government. A sovereign act imprisoning domiciled enemies could not be controlled by municipal law. As in the case of confiscation, however, municipal law can enforce such treaties by preventing their infraction by inferior agencies of government.

By its adhesion to the Hague and Geneva conventions the United States has recognized its duty to abstain from forbidden methods of warfare, from the inhuman treatment of prisoners of war, from unnecessary injury to non-combatants and from injury to red cross agencies and to the sick and wounded in their care. So far as they are duties of abstention, these matters are addressed to the political department of government, but they may be indirectly enforced by the control, through municipal law, of the armed forces of the government, and will be considered under obligations of prevention.

In the enforcement of prize law, however, the obligation of the belligerent state to observe certain restraints in the capture of enemy property at sea is enforced through municipal law directly against the government. The principle observed by the United States prize courts and other rules of municipal law bearing on this point will therefore concern us at this point. In at least one case, also, judicial methods have been provided for the protection of enemy private property on land. This case merits brief consideration.

ENEMY PRIVATE PROPERTY AT SEA

The general right of capturing enemy property at sea is recognized by international law but there are specified cases in which the belligerent must abstain from such captures. The enforce-

[5]Protection to resident enemy persons has been guaranteed in twenty-seven treaties with twenty-three countries, of which the following are now (1915) in force: Argentine Republic, 1853, art. 12, Malloy, p. 24; Bolivia, 1858, art. 11, p. 122; Columbia, 1846, art. 27, p. 310; Costa Rica, 1851, art. 11, p. 345; Honduras, 1846, art. 11, p. 956; Italy, 1871, art. 21, p. 975; Mexico, 1848, art. 22, p. 1117; Paraguay, 1859, art. 13, p. 368; Prussia, 1799-1810, revived 1828, art. 23, p. 1494; Sweden, 1783-1798, revived 1816, 1827, art. 22, p. 1732.

ment of this duty is provided for by the rule recognized in the United States whereby all prizes, enemy as well as neutral, are submitted to prize courts before final appropriation. The general principles of prize court jurisdiction and procedure have been discussed under the law of neutrality[6] and it should again be emphasized that the whole institution of prize courts is primarily intended for the benefit of neutrals. Enemies benefit from them only incidentally. The rules applied in distinguishing enemy and neutral property and vessels has also been discussed as has the attitude of the United States on the question of total immunity of enemy private property from seizure during war.[7]

In the case of neutral vessels and goods, immunity from capture is the general rule. Capture can only be justified in certain exceptional cases, as breach of blockade, carriage of contraband, unneutral service, constructive enemy character, or necessity. With enemy property and vessels the case is reversed. Here the rule is liability to capture. Cases of immunity are exceptional. Under the two treaties[8] which the United States has concluded, insuring the total immunity of enemy private property during war, this would not be true, and if this principle were adopted as a general rule, a condition which the United States has advocated since the foundation of the Republic and notably at the second Hague conference, enemy private property and merchant vessels at sea would be in practically the same condition as neutral vessels and property are today. This condition, however, does not exist, and by international law cases in which enemy property at sea is immune, are exceptions to the general rule of liability.

The cases in which enemy property at sea is immune from capture are defined in the Declaration of Paris and the Hague conventions and may be classified as (1) vessels in port on the outbreak of war, (2) vessels leaving their last port before the outbreak of war, (3) postal correspondence, (4) coast fishing vessels, (5) enemy property under the neutral flag, (6) "vessels charged with a religious, scientific or philanthropic mission," (7) hospital ships bearing the red cross flag when they are commissioned and authorized by the belligerent government. In the

[6]Supra p. 187 et seq.

[7]Supra, pp. 158, 166.

[8]Treaties with Prussia, 1785-1799, art. 23, Malloy, p. 1484; Italy, 1871, art. 12, p. 973.

last two cases public as well as private owned vessels are immune from capture.[9]

The immunities granted in these cases were provided for in Stockton's Naval War code of 1900 to 1904.[10] In the proclamation and instructions[11] on the outbreak of the Spanish war, days of grace on departure with immunity until they reached a home port were granted to enemy vessels, and the immunity of vessels bound for the United States which left their last port before the outbreak of war was also prescribed, the rule being applied in several cases.[12] In the case of the Paquete Habana,[13] arising during the Spanish war, the court held that coast fishing vessels of the enemy were not liable to capture, before the enunciation of this doctrine by any international convention.

The immunity of enemy property under the neutral flag is a doctrine which has been supported by the political department of the government since its foundation, but not given legal recognition until the war of 1898, when the president's proclamation required adhesion to the rules of the Declaration of Paris in this respect.[14] In many of the early treaties the doctrine of "free ships, free goods" had been specified as binding between the contracting parties.[15]

Although there have not been a great many cases before the prize courts in which these immunities have been applied, in the few cases that have come up the court has followed the rules laid down in treaties and executive orders. The general principle requiring the adjudication of all prizes operates as a guarantee to the enforcement of this duty of abstention.

[9]See Hague Conventions, 1907, x, arts. 1-3, vi, xi.

[10]Stockton's Naval War Code, 1900-1904, arts. 13-15, 21-22.

[11]Proclamation, Apr. 26, 1898, 30 stat. 1770; Instructions, June 20, 1898, art. 7, For. Rel. 1898, 780.

[12]The Buena Ventura, 175 U. S. 384, was released under the proclamation. The Panama, 176, U. S. 535, although in the terms of the exemption, was condemned as an armed vessel forming part of the enemy auxiliary navy, a case provided for in the proclamation. The Pedro, 175 U. S. 354, although her ultimate destination was the United States, was condemned because her immediate voyage was to an enemy port. The doctrine of continuous voyage was here denied, where it would have operated to the advantage of an enemy vessel. Four justices dissented from this opinion but it was followed by the court in the case of the Guido, 175 U. S. 382. See Moore's Digest, 7:453-9.

[13]The Paquete Habana, 175 U. S. 677, (1899).

[14]Proclamation, Apr. 26, 1898, 30 stat. 1770.

[15]This principle has been embodied in thirty-one treaties, with twenty-one countries. Seven are now (1915) in force. Supra p. 164, note 106.

Were the international prize court established as provided by the Hague conventions of 1907, cases involving these immunities would all be subject to its jurisdiction.[16] By its signature of this convention and its consent to its ratification, the United States signified its willingness to add this further sanction to the enforcement of these duties.

ENEMY PRIVATE PROPERTY ON LAND

According to international law, enemy private property on land is exempt from capture.[17] Consequently, the government is under an obligation to abstain from such captures. Exceptions to this rule are recognized in the case of necessity, which justifies military requisitions. The expense of adminstering territory under military government may also be reimbursed by money contributions of the inhabitants, which thus resemble taxes. In both of these cases the enforcement of the rule is in the hands of military authorities, and is discussed in considering the obligations of prevention in relation to the land forces.[18]

Ordinarily the sanction of military law, controlling the armed forces, alone guarantees this obligation of abstention. There is no possibility of recourse to judicial authority as is provided in the case of naval captures. Prize courts have repeatedly asserted that their jurisdiction does not extend to land captures.[19] The reason for this difference is to be found in the fact that in naval war, questions of neutral rights are apt to be involved; whereas this is not so true in land captures. Property on enemy territory is prima facie enemy property. The enemy's privilege of a judicial adjudication of his property captured at sea arises from the probabliity of its association with neutral property.

It is not, however, impossible that all property seized on

[16]The international prize court is given jurisdiction over enemy property when the case involves enemy cargo in a neutral ship, and when a claim is based on an allegation that the seizure has been effected in violation of the provisions of a convention or of an enactment of the belligerent captor. Hague conventions, 1907, xii, art. 3. See Charles, Treaties, 1913, p. 250.

[17]United States courts have stated this principle, see Brown vs. U. S., 8 Cranch 110, (1814); U. S. vs. 1756 shares of capital stock, 5 Blatch. 231; U. S. vs. Klein, 13 Wall. 128, 137; Lamar vs. Brown, 92 U. S. 194, Moore's Digest, 7;288-289.

[18]Infra. p. 210.

[19]Brown. vs. U. S., 8 Cranch. 110, (1814); Kirk vs. Lynde, 106 U. S. 315, 317; Oakes vs. U. S., 174 U. S. 778, 786, (1899).

land should be subject to legal adjudication before confiscation. The British prize courts have in fact been given jurisdiction of such seizures.[20] In the United States the abandoned and captured property act of 1863[21] furnished a somewhat similar remedy during the Civil war. By this act, a sum equal to the value of captured property was to be deposited in the treasury, and persons claiming ownership were permitted to prosecute claims for such property in the court of claims. Property intended for use in waging war such as arms, ordinance ships, steamboats, forage, military supplies, etc., were excluded, and persons who had given "aid or comfort" to the rebellion were denied this privilege.

Such privileges as this have not been granted in other wars. This act probably was due to the fact that being a civil war, many inhabitants of the seat of war were loyal to the union cause. The act was to reimburse such persons, rather than enemies. As a matter of fact, by an act of 1864[22] it was specifically declared that the jurisdiction of the court of claims should not extend to general claims "against the United States growing out of the destruction or appropriation of or damage to property by the army or navy" during the Civil war.

In general therefore the United States does not provide for the enforcement by means of judicial adjudication of its duty to abstain from capturing enemy private property on land. The duty is enforced indirectly by measures for preventing illegal seizures by armed forces.

[20]Statute 1840, 3-4 Vict. c. 65, sec. 22, The Banda and Kirwee Booty L. R. 1 Adm. and Ecc. 109 (1866) Pitt Cobbett cases and opinions on international law, 2 vols., London, 1913, 2;201.

[21]Act March 12, 1863, 12 stat. 820; Moore's Digest, 7;295-300. Cases under this act, see Young vs. U. S. 97 U. S. 39, (1877); Briggs vs. U. S., 143 U. S. 346, (1892); Vance vs. U. S., 30 Ct. Cl., 252. British subjects enjoy the benefits of this act, U. S. vs. O'Keefe, 11 Wall. 178; Carlisle vs. U. S. 16 Wall 147.

[22]Act, July 4, 1864, 13 stat. 381.

CHAPTER XV. OBLIGATIONS OF PREVENTION

INTRODUCTORY

It is for the most part through the enforcement of the duty of prevention, as against its armed representatives, that the state fulfills its duties of abstention; and it is largely through the municipal sanctions thus enforced that the law of war is observed at all. The belligerent's duties toward neutrals tend to be observed because of the sanctions of international law. Neutrals can bring threats of force and demands for reparation which the belligerent usually finds it convenient to heed. But in the law of war the enemy is already using all the force he can. The treaty of peace definitely concludes any further demand for reparation. What therefore is the force which causes obedience to the law of war? There is none, except that of self-interest. Reciprocity benefits both belligerents. Each knows that a breach of law on its part will bring about a retaliatory breach by the other. If this process were continued, war rights would soon pass all limits, the law of war would disappear and savagery would prevail. It is only in so far as the principle of reciprocal benefit acts that the law is obeyed.

The state must therefore take extreme care that its armed representatives do not unwittingly break the law of war, for the minute the breach is made, a progressive march of retaliation and counter-retaliation will have begun which, although contrary to the self-interest of both, neither can stop. We will therefore discuss the laws of the United States designed to prevent infractions of the law of war by its (1) land forces and (2) naval forces. As a third division we will consider the laws of like effect in reference to (3) the civil population.

ACTS BY LAND FORCES

Military law, military government, and martial law are three terms relating to the legal position of land forces in time of war which should be distinguished.[1] Martial law is the law in force in portions of the home territory of a belligerent near

[1]On these distinctions see Ex Parte Milligan, 4 Wall. 2; W. E. Birkheimer, Military Government and Martial Law, 2nd. ed. London, 1904; p. 21, 372, G. B. Davis, Treatise on Military Law, p. 6.

the seat of war or in a state of insurrection. It is a matter regulated entirely by constitutional law and as its effect is primarily domestic it has no connection with international law, except in case neutrals are injured by the suspension of constitutional guarantees, in which case international questions would arise, but extraneous to the present topic.

Military government exists when an army is in secure occupation of a portion of enemy territory. The law applied under military government, (to which the term martial law is also sometimes applied),[2] bears a relation to martial law, but in reality the condition is somewhat different. In the latter case the persons affected are for the most part citizens; in the former they are foreigners. The law of military government, therefore, is a matter governed by international law. The occupying belligerent owes obligations to the inhabitants and they owe obligations to it, both of which are determined by international law. We are therefore concerned here with the law of military government which the United States requires of its armies.

Military law is the law regulating the conduct of the army. It consists of the rules defining the powers and liabilities of military officers and enlisted men and the means of enforcing them. It defines the constitution of military tribunals, such as courts martial, military commissions and commissions of inquiry, their jurisdiction and their procedure, as well as the rules of executive subordination and enforcement of discipline. In the United States, military law is found in statutes, army regulations, and instructions and opinions of courts, attorneys general and judge advocates general.[3] Military law is not a part of international

[2]See Lieber's Instructions, art. 1-10. By applying the theory of de facto governments, that sovereignty passes immediately upon effectual occupation of the territory, the law of military governments fulfills our definition of marital law, for the occupied territory has become home territory. With this conception the law of military government would be a subject of constitutional rather than of international law. Because of the practical difference and because of the fact that military government is regarded as a temporary and not permanent transfer of sovereignty, it seems well to preserve the distinction.

[3]The statutory laws relating to the control of the army, annotated with references to court decisions, and official opinions, may be found in "The Military laws of the United States", 1901, ed. G. B. Davis, with supplement to 1911, ed. J. B. Porter. The "Digest of Opinions of the Judge Advocates General of the Army" published in 1912, C. R. Rowland, ed., also contains references to statutes, cases and opinions of attorneys general bearing on the various points. See also annual publication of Army Regulations and General Orders of the War Department.

law. The relationships it defines are entirely domestic. Yet it is of great importance for our present subject, for it is through the sanctions of military law that the army is compelled to obey the law of war. Much of it consists of laws supplementary to international law.

There has long been a discussion whether war is a relation between states or between armies. The latter view was eloquently espoused by Rousseau[4] and apparently influenced the early statesmen of the United States. At any rate the policy they established, now a national tradition, that private property ought to be immune from capture in war, is in harmony with it. The present regime of universal conscription armies seems to nullify the theory, in Europe at least. In our view Rousseau's dicta is untenable. The relationship is one between two communities or states, not between two armies or two navies. Facts are sufficient justification for the assertion. It is, however, clear that though both are enemies a distinction exists between combatants and non-combatants. We may therefore consider successively the duties of the army to (1) combatants and (2) non-combatants.

(1) The duties of armed forces toward enemy combatants include such matters as the employment of only legitimate means of warfare, care of sick and wounded, treatment of prisoners of war and spies, observance of flags of truce, armistices, etc.

A number of early treaties prescribed humane treatment for prisoners of war.[5] All of the subjects mentioned are regulated in detail in the Hague conventions of 1899 and 1907 relating to the laws of war on land and in the Geneva conventions of 1864 establishing the red cross flag and prescribing rules for the care of the sick and wounded. By its ratification of these treaties the United States has made them law for its armies. The same matters are covered by Francis Lieber's celebrated instructions for the government of the armies of the United States in the field, written during the Civil war. On April 24, 1863, these instructions were officially promulgated as a general order of the war department and are therefore binding law for the army. The in-

[4] J. J. Rousseau, The Social Contract, Translation by Tozer, London, 1909, p. 106. See discussion on this question, J. Westlake, Principles of International Law, Cambridge, 1894, p. 258; G. M. Ferrante, Private Property in Maritime War, Pol. Sci. Quar., 20; 706, (1895).

[5] Treaties, Algiers, 1816-1830, art. 17, p. 15; Prussia, 1785-1796, art. 24, p. 1484; 1799-1810, revived 1828, art. 24, p. 1494; Mexico, 1848, art. 22, p. 1118; Morocco, 1787-1836, art. 16, p. 1209, Tripoli, 1805-1911, art. 16, p. 1791.

structions give detailed regulations defining the limits permitted by necessity and by retaliation, the treatment of prisoners of war and spies, use of flags of truce, exchange of prisoners, and prohibited measures such as assassination.

The enforcement of these laws is largely in the hands of military commissions. Courts martial, being of statutory jurisdiction, can not take cognizance of many of these cases, as violations of the laws of war are not listed in the offenses specified in the articles of war.[6] By statute courts martial are, however, given jurisdiction over the trial of spies,[7] and over officers or soldiers injuring persons bringing provisions or other necessaries to the army while in "foreign parts". This jurisdiction extends to camp followers, retainers and militia in the service of the government, as well as the regular army and volunteers violating the articles of war.[8] The imposition of criminal penalties upon violators is the means employed by both courts martial and military commissions for enforcing the law.[9] It must not be lost sight of, however, that the control of the army is largely executive rather than legal. It is to the discretion of commanding officers that enforcement of the laws of war, whether unwritten, in treaties, or in orders, is left.[10]

(2) Non-combatants vary in legal rights somewhat according to circumstances. Thus non-combatants domiciled in the belligerent's own state, in territory under military government and in the actual zone of hostilities enjoy different immunities. The army does not affect the first class. Their treatment will be considered under the duties of the civil population.

[6]On authority and jurisdiction of courts martial and military commissions see Rev. Stat. sec. 1342-1343; Military Laws, 1911, p. 744, note 1, p. 745; Dig. Op. Judge. Ad. Gen., 1912, p. 1067; Lieber's Instructions, art. 13.

[7]Rev. Stat. sec. 1343.

[8]Articles of War, Rev. Stat., sec. 1342, art. 56, 63, 64. Courts martial may punish members of these classes for felonies in time of war, (art. 58) and soldiers for being found over a mile from camp without leave, (art. 34).

[9]Dig. Op. Judge Ad. Gen., 1912, pp. 510-511, 1071-1072.

[10]By the Articles of War an officer must keep good order and "to the utmost of his power, redress all abuses and disorders which may be committed by an officer or soldier under his command, (art. 54) and officers guilty of conduct unbecoming an officer and a gentleman may be dismissed." (art. 61).

In the second case the United States has recognized the principles that such persons are immune from injury and their property from confiscation so long as they observe their duty of acquiescence to the occupying government. The duties of the army in this connection are prescribed in the Hague conventions and in Lieber's instructions. Special instructions to army officers are also usually issued providing rules for military government. It is a remarkable fact that during General Scott's occupation of parts of Mexico in 1846, he enforced the general rule of paying for requisitions and levying only contributions in lieu of taxes to pay for the civil administration of the territory, until he had received special instructions from Washington to adopt a harsher practice. It was thought that Mexico was continuing the war because the civil population was not feeling its hardship, consequently the instructions ordered him to support his army by uncompensated seizures. Very reluctantly he undertook this policy, which is contrary to modern international law and in his opinion at that time was inexpedient. Here was a case where the discretion of the general on the field was more efficient in enforcing the law of war than that of authorities higher up.[11]

The conduct toward non-combatants in the actual zone of hostilities is also provided for in the Hague conventions. A number of early treaties provided for the immunity of non-combatants in person and the payment for all requisitions.[12] The Hague conventions besides covering these points forbid unnecessary injuries to non-combatants, the bombardment of undefended towns, and pillage. Similar matters are covered in Lieber's instructions. Special statutes and instructions, however, especially during the Civil war, have required a far harsher treatment.[13] The treaties and instructions covering these points are law and enforceable through the exercise of penal jurisdiction by military commissions and through executive coercion. The preservation of the rights of non-combatants may also be enforced through laws providing for their indemnification for requisitions, after the war. This is provided for in the provi-

[11]Moore's Digest, 7;282-285.

[12]Treaties with Prussia, 1785-1796, art. 23, p. 1414; 1799-1810, revived 1828, art. 23, p. 1444; Mexico, 1848, art. 22, p. 1117; Italy, 1871, art. 21, p. 975.

[13]Confiscation act, July 17, 1862, 12 stat. 589. On confiscation of cotton and slaves during the Civil war see Moore's Digest 7;300-366. For orders during Mexican war see Moore's Digest 7;282-285.

sions of the Hague conventions and Lieber's instructions which require the giving of cash or receipts, good after the war for all requisitions.[14] In the Civil war by the captured and abandoned property act[15] the United States provided for the indemnification of non-combatants. A sum equal in value to all requisitions was to be deposited in the treasury and all persons were compensated from this fund if they could prove that they had taken no active part in the rebellion.

ACTS BY NAVAL FORCES.

The law governing the conduct of the naval authorities is contained in statutes, regulations, instructions, and the opinions of courts.[16] Naval courts martial with jurisdiction over offenses against the statutory articles for the government of the navy are provided, but the enforcement of the law of naval warfare is largely intrusted to the discretion of commanding officers.

(1) The duties of the navy toward enemy combatants are specified in the Hague convention of 1907 and the Geneva conventions as applied to naval warfare adopted at the same time. In 1868 a treaty was signed extending the provisions of the Geneva convention to naval war. It was not generally ratified, although the United States did so in 1882. In 1898 the United States issued a circular stating that these additional articles would serve as a modus vivendi during the war with Spain, and in consequence the Navy Department issued a General Order requiring the observance of these regulations in the treatment of "The Solace", which had been fitted out as an ambulance ship.[17] Besides incorporating the principles of the Geneva convention, the Hague convention of 1907 limits the use of submarine contact mines, and the bombardment of undefended coast towns. In Stockton's Naval War Code, in force from 1900 to 1904, and in instructions issued at the beginning of wars[18] the limits of hostile acts against enemy public forces have been

[14]Hague Conventions, 1907, v, art. 52; Lieber's Instructions, art. 38.

[15]Act March 12, 1863, 12 stat. 820. See Moore's Digest, 7;295-300.

[16]Articles for the government of the Navy, Rev. Stat. sec. 1624; Regulations for the Government of the Navy of the United States, 1913, containing also permanent instructions.

[17]Additional articles to Geneva Convention, 1868, Modus Vivendi, 1898, General Order of Navy Dept., and Correspondence, Malloy, Treaties, p. 1907-1924.

[18]Instructions to Blockading vessels and Cruisers, June 20, 1898, Gen. Ord. 492, For. Rel. 1898, p. 780.

prescribed. In the navy regulations of 1913 it is provided that "when the United States is at war, the commander in chief shall require all under his command to observe the rules of humane warfare and the principles of international law."[19] It will thus be seen that, as in the case of the army, the enforcement of the duties of naval war is largely left to the executive control of naval officers.

(2) The duties of the navy toward enemy non-combatants relate largely to the exercise of the right of capturing private property at sea, but certain restrictions upon possible injury to persons are also required. Naval forces are forbidden bombarding undefended coast towns, indiscriminately laying submarine contact mines or unnecessarily cutting cables between belligerent and neutral territory, by the Hague conventions of 1907.[20] These provisions are designed for the protection both of enemy non-combatants and of neutrals. The same obligations with the exception of that relating to mines were prescribed in Stockton's Naval war code and it was especially stated that "non-combatants are to be spared in person and property during hostilities as much as the necessities of war and the conduct of non-combatants will permit.[21]

The enforcement of these duties, like those required in dealing with enemy armed forces, is left to the authority of naval officers, subject to the control of the navy department through instructions and executive action.

In general the duty in reference to the seizure of enemy property at sea is enforced by the same measures as those relating to the seizure of neutral prizes. The law of prize grew up for the benefit of neutrals but because of the frequent difficulty of determining between neutral and enemy property at sea, enemy individuals are benefited by the same rules.

As pointed out in considering the law of neutrality, the seizure of prizes by public naval forces alone, their care, treatment, bringing in and adjudication are provided for in treaties, and instructions of the navy department. These provisions are made effective by such measures as the abolition of privateering, the abolition of prize money, the holding of vessels liable in damages for seizures without probable cause, and by the establishment of prize courts with adequate jurisdiction. Although

[19]Navy Regulations, 1913, sec. 1635.

[20]Hague Conventions, 1907, iv, art. 54, viii, ix.

[21]Stockton's Naval War Code, art. 3, 4, 5.

enemy prizes benefit in the main by provisions applicable to neutrals, this is not always true. Enemy property is prima facie condemnable; therefore it is seldom that damages can be obtained for a seizure even where the vessel proves to be immune.[22] Also, because of this prima facie liability, the destruction of enemy prizes is not, by the Declaration of London, made subject to such grave presumptions of illegality, and the treatment to be accorded the officers and crew of enemy vessels is different from that in the case of neutrals.[23]

The general principle that prizes must be brought in and that title does not pass until legal adjudication applies to enemy private vessels as well as neutral. The law applied by prize courts in adjudicating enemy prizes has been considered in treating the belligerent's obligations of abstention toward neutrals and enemies.

ACTS BY THE CIVIL POPULATION.

International law requires a belligerent state to prevent its citizens from performing certain acts against the person and property of enemy individuals. In a large number of treaties the United States has recognized the principle that enemy individuals in its territory are immune from injury or confiscation of property.[24] During both the Mexican and Spanish wars special instructions specifically called attention to such treaties.[25] The usual criminal laws of the states serve to prevent the spo-

[22]The Paquete Habana, 175 U. S. 677, (1899); and 189 U. S. 453, (1903).

[23]The Declaration of London, 1909, art. 48-54, on destruction of neutral prizes.

[24]The United States has concluded twenty-seven treaties with twenty-three countries on this subject. Ten are now in force. As examples see treaty with Mexico, 1831-1881, art. 26, p. 1903; 1848, art. 22, p. 1117, Spain, 1795-1902, art. 13, p. 1645. Generally a time is specified, varying from six months to a year, in which merchants may wind up their affairs and leave the country unmolested. Supra, p. 202, note 5.

[25]Circular of Treasury Department to customs collectors, June 11, 1846, Br. and For. St. Pap., 34;1138, calling attention to the treaty of 1831, giving Mexican merchants the right to leave the country, and letter of Asst. Sec. of State, J. B. Moore, Moore's Digest, 7;255, calling attention to the provisions of the Spanish treaty of 1795. Spain claimed that the treaty was abrogated by the war, a claim which the United States denied. Such provisions as this would obviously be meaningless if the treaty were abrogated by war. Several of these provisions are followed by the statement that they shall not be abrogated by war; See Treaty with Prussia mentioned, supra p. 202, note 5.

liation of such aliens the same as in time of peace. The treaties would also avail to gain freedom for the alien in case of detention by executive authority unless such detention were specifically authorized by act of congress or unless martial law had been declared in the territory in question. Where such cases exist, undoubtedly the courts could not intervene to release detained enemy persons. In the alien enemies act of 1798 the detention or removal of such persons is provided for but express provision is made for the observance of treaty exemptions.[26] During the Civil war numerous detentions of this kind were made, and although the courts held after the war that they were not in all cases justifiable according to the constitution, as a matter of fact while war was in progress judicial process was of no benefit to the prisoners.[27] In this case there were, of course, no treaties providing immunity.

United States law recognizes the principle that all commercial intercourse between enemies stops at the outbreak of war and the courts will not enforce obligations due to enemies on contracts or commercial transactions made after the outbreak of war.[28] The principle is, however, by no means of universal application. Private contracts valid before the war are valid after it, unless, as in the case of insurance contracts, time is an element.[29] In such cases war suspends but does not abrogate contracts. Furthermore contracts made in good faith, which have no relation to the war, may be enforceable even when made during war. Such a contract has been upheld where both parties were domiciled in the same territory,[30] and a devise by a United States citizen to an alien enemy, resident in the enemy country, was upheld.[31]

The confiscation of debts or other enemy property on land in the absence of express act of the sovereign has also been forbidden[32] by the courts. After the Revolutionary war the

[26]Act July 6, 1798 1 Stat. 577. Rev. Stat. sec. 4067-4070.

[27]Ex parte Milligan, 4 Wall. 2.

[28]Scholefield vs. Eichelberger, 7 Pet. 586; The Rapid, 8 Cranch 155, (1814); President's proclamation Aug. 16, 1861, 12 stat. 1262.

[29]N. Y. Life Ins. Co. vs. Statham, 93 U. S. 24, (1875).

[30]Kershaw vs. Kelsey, 100 Mass. 561. (1868).

[31]Fairfax' Devisee vs. Hunter's Lessee, 7 Cranch 603, (1813). On this general subject see Moore's Digest, 7;237-254.

[32]Georgia vs. Brailsford, 3 Dall. 1; Ware vs. Hylton, 3 Dall. 199; Stanbery, Att. Gen., 12 op. 72, (1866); Planters Bank vs. Union Bank, 16 Wall. 483; Williams vs. Bruffy, 96 U. S. 176, (1877); Brown vs. U. S. 8 Cranch 110, (1814).

courts held state confiscation acts invalid, as conflicting with the British treaty of peace. The fact that a citizen had paid his debt to the state treasury was held to be no bar to the British creditor's right of action.[33] Confiscation acts by congress would undoubtedly be regarded as valid even when opposed by treaties, as acts of congress are ordinarily held to supersede earlier treaties. Whether the passage of such an act at all is within the constitutional competence of congress is a question not considered here. If the guarantee of enemies against confiscation of debts were included in the constitution, undoubtedly the privilege could be enforced even against congress by the power of the courts to declare laws unconstitutional. In the absence of a treaty, constitutional provision or federal statute, it is questionable whether state statutes confiscating enemy debts could be prevented by the courts.

The confiscation of enemy private property on land when in the zone of hostilities or in territory under military government is justified on principles of necessity under the restrictions required in levying requisitions and contributions by the army. Where the property is in the belligerent state's own territory, not under martial law, the plea of necessity can not be offered. In such cases the courts have held that the property may not be confiscated unless an act of the sovereign specifically requires. The outbreak of war does not itself confiscate enemy property, although the court held that confiscation by the sovereign was compatible with international law, a view no longer held.[34]

Enemy merchant vessels in the belligerent's jurisdiction on the outbreak of war are subject to the same rule. By the Hague convention they may not be confiscated unless by their build they show that they "are intended for conversion into war ships." The same convention, however, permits such vessels to be detained or requisitioned with compensation where they can not leave in a short time because of "force majeure," but permission to leave in a specified time is declared "desirable".[35] The United States followed this rule in its naval instructions

[33]Ware vs. Hylton, 3 Dall. 199, (1796).

[34]Brown vs. U. S. 8 Cranch 110, (1814); Cargo of Ship Emulous, 1 Gall. 562; U. S. vs. 1756 shares of Capital Stock, 5 Blatch. 231.

[35]Hague Conventions, 1907, vi. This convention has not been signed or ratified by the United States.

of the Spanish war.[36] The subject has been discussed at greater length in considering duties of abstention. Suffice it to say here that the law of the United States attempts to prevent the confiscation of such vessels as well as other enemy private property in its jurisdiction on the outbreak of war.

[36]Instructions, June 20, 1898, art. 7, For. Rel. 1898, p. 780; Proclamation, Apr. 26, 1898, 30 stat. 1770.

CHAPTER XVI. CONCLUSION.

The views enunciated in the foregoing pages are based on the theory that all rules of conduct, for a breach of which states as such are held liable, are rules of international law. Viewed from this standpoint, the rules of international law can be divided into two general classes: (1) those prescribing conduct for the sovereign power in states, (2) those prescribing conduct for persons and governmental agencies subject to the control of the sovereign power.

RULES OF INTERNATIONAL LAW PRESCRIBING CONDUCT FOR SOVEREIGN POWERS

In a sense all rules of international law fall in the first class. The responsibility for the observance of international law and consequently the duty of enforcing it, rests with sovereigns. Yet if we consider the rules themselves, and regard the conduct prescribed rather than the responsibility imposed, a large part of them belong in the second class and are capable of enforcement by municipal law.[1]

It is hoped that the foregoing pages have indicated what these rules are and the manner in which they are enforced by the municipal law of the United States.

The rules of international law which prescribe conduct for the sovereign alone are known as "political questions", and embrace such matters as the recognition of new states, and newly acquired territory, intervention, termination of treaties and declarations of war. In respect to these matters, international law has laid down rules of varying definiteness. It attempts to determine when new states, new governments, and belligerent and insurgent communities must be recognized, when intervention is proper, under what conditions treaties may be terminated, etc. According to the older writers, it detailed the circumstances under which a just war might be waged. Observance of these rules, if indeed they are rules of international

[1]"This usage thus becomes not merely a rule for the guidance of the state, but for the guidance, enjoyment and observance of the individual member of the body politic, and the very claim of the rule in question makes it of necessity a measure of municipal right and duty." J. B. Scott, The Legal Nature of International Law, Am. Jour. Int. Law, 1;857, (1907).

law at all, is, however, left to the discretion of the political departments of the government. In the United States the president and congress act in such circumstances according to their views of national policy. They may ordinarily follow the practice of nations in making these decisions, but it is certain that municipal law can not compel them to do so. The questions are political in character. Municipal law adjusts itself in accordance with such political acts, but does not control them. The judicial and administrative organs of government in these matters will look to the political organs for guidance, exclusively. They will not look beyond them, to international law. However, even in rules of this character, where international law itself does not look down to the officer or individual upon whose activity the effectiveness of the rule must ultimately depend, municipal law may perform this step. It may specify and enforce obligations upon the public officers and subjects of the state by permanent rule, the performance of which will insure the observance by the state of those prescriptions of international law directed to it. Municipal law of such character, filling in the necessary details of international law in reference to the duties of officers and private persons, is of the greatest importance in considering the legal sanctions for the enforcement of international law, and has here been referred to as municipal law, supplementary to international law.

RULES OF INTERNATIONAL LAW PRESCRIBING CONDUCT FOR PERSONS AND OFFICERS

The second group of rules of international law prescribes conduct for private persons and public officers. Such rules may be effectively enforced, may be rules of law in the Austinian sense, through concurrent enforcement by the municipal law of all civilized countries. Yet they continue to deserve the name international because it is on account of the pressure of international public opinion that they are thus concurrently enforced by states.[2] States are held internationally responsible

[2]Fitzjames Stephen remarks that international law is not law so far as it is international and is not international so far as it is law. (History of the Criminal Law of England, 2;35). With the Austinian conception of the law this dilemma is inevitable if we accept the literal meaning of the term international law, as a law between states. However, by admitting as rules of international law those in which a vicarious liability is imposed upon states for acts of individuals, we believe it is possible to vindicate the term. With such rules the incidence of the *liability* and of

for their observance. Many rules of this character as well as rules supplementary to international law are enforced through the law of the United States. The obligation to enforce them has been recognized in treaties, statutes, executive orders and judicial decisions.

(1) *Treaties.*

Much of international law has been included in treaties to which the United States is a party. Especially is this true in reference to the laws of war and neutrality which have been to a considerable extent codified in the Hague and other international conventions. It must, however, be emphasized that although declared law by the constitution, treaties may embrace political questions incapable of enforcement through municipal law. The constitutional provision and the practice of courts and executive officers in giving direct effect to treaties, so far as they apply to individuals, impart a municipal sanction to the rules of international law thus defined.

the *sanction* are distinct. The rules are international because by general international practice, states are held liable. Yet the rules may relate to the conduct of individuals and be capable of sanction by state authority. In so far as they are thus sanctioned by concurrent adoption into the municipal law of states they would conform to Austin's definition of law. It seems to the author that different writers on the legal nature of international law have written to cross purposes from failure to reach an agreement as to whether the character of the rule, especially the responsibility it implies, or the character of the sanction is the criterion of international law. It is too clear to demand refutation that if no rules are international law except those enforceable against states, international law can not be a part of municipal law. We agree that "while the principles which international law embodies are the product of international usage and agreement, their legal force as rules controlling the administration of justice between litigants is derived from the sanction of the state whose justice the courts administer and by whose laws the courts themselves are created." (Willoughby, Am. Jour. Int. Law, 2;357). This, however, simply states that effective sanction can be given to rules only through state authorities, and if this sanction is given the rules are municipal law. If we take the character of the rule rather than of its sanction as our criterion of international law, Willoughby's statement does not prevent the rule being at the same time a rule of international law. See J. B. Scott and W. W. Willoughby, The Legal Nature of International Law, Am. Jour. Int. Law, 1;831, 2;357, and an effort to reconcile these two articles. Note, Harvard Law Review, 22;66. See also John Westlake, Is International Law a part of the law of England? Law Quar. Rev. 22;14.

(2) *Statutes.*

Holland calls attention to the fact that in England an "express recognition of international law in an act of parliament is extremely rare,"[3] and he notes only five cases[4] in which the term is used expressly. In the United States statutes, the use of the term appears to have been more frequent. "The law of nations," which is generally used in preference to the more recent term "international law," is of frequent occurrence.[5] The most important statutes bearing on our subject

[3]T. E. Holland, Studies in International Law, Oxford, 1898, p. 193.

[4]The term "law of nations" is used in the act relating to the privileges of ambassadors, 1709, (7 Anne c. 12), the prize jurisdiction of the court of admiralty, 1815 (55 Geo. III. c. 160, sec. 58), The Naval Prize Act, 1864 (27-28 Vict. c. 25), and "International Law" in the Territorial Waters Jurisdiction Act, 1878, (41-42 Vict. c. 73, sec. 7) and the Sea Fisheries act, 1883, (46-47 Vict. c. 22, sec. 7). Holland also notes the use of certain terms peculiar to international law as "neutral ship," "proclamation of neutrality," "belligerent" in a few statutes. Holland, op. cit., p. 194.

[5]The term "law of nations" has been used in the following cases, possibly others: A Resolution of Congress, May 22, 1779, states that the United States will cause the "law of nations to be most strictly observed," (Journ. Cong. 5;161, Ford, ed. 14;635); Aug. 2, 1779, the United States will pay expenses for all prosecutions in states for such "transactions as may be against the law of nations", (Journ. Cong. 5;232, Ford, ed., 14;914); Nov. 23, 1781, recommends that state legislatures provide for the punishment of offenses relating to violation of safe conducts, breaches of neutrality, assaults upon public ministers, infractions of treaties, and "the preceding being only those offenses against the law of nations which are most obvious, and public faith and safety requiring that punishment should be coextensive with all crimes, Resolved, that it be further recommended to the several states to erect tribunals in each state, or to vest ones already existing with power to decide on offenses against the law of nations not contained in the foregoing enumeration," (Journ. Cong. 7;181, Ford, ed., 21;1137); Dec. 4, 1781, Courts to determine prize cases by "the law of nations, according to the general usages of Europe," (Journ. Cong. 7;189, Ford, ed., 21;1158); Constitution, 1789, Congress given power "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations," (Art. 1, sec. 8, cl. 10); Act, Sept. 24, 1789, District courts given jurisdiction of suits brought by aliens for torts in violation of "the law of nations or of treaty," and the supreme court given exclusive jurisdiction of suits against public ministers "as a court of law can have consistently with the law of nations," (1 stat. 76, sec. 9,13; rev. stat. sec. 563, cl. 16, 687; Judicial code of 1911, act March 3, 1911, 36 stat. 1087, sec. 24, cl. 17, 233); Act, Apr. 30, 1790, prescribes criminal pen-

may be roughly divided into (1) those defining the jurisdiction of courts, (2) those creating and defining the functions of public officers, (3) those designed to prevent infractions of duty by public officers, and (4) those of like effect in reference to private persons.

(1) The jurisdiction of courts in relation to ambassadors, consuls, and aliens; over offenses against foreign states; and over prizes of war have been prescribed both by the constitution and statutes, often in terms making specific reference to international law.

(2) Statutes prescribing the functions of such officers as ambassadors, ministers and consuls, are of distinct importance in the observance of international law, as also are those giving executive, naval and military officers authority to perform duties required by international law, such as expelling foreign vessels of war which have violated neutral rights, and extraditing criminals when required by treaty.

In these two cases, statutes frequently contain rules of international law itself. When a statute requires a court to refuse jurisdiction of suits against foreign ministers, the rule is one both of municipal and international law.

(3) Statutes frequently provide for enforcing the duties of officers. Naval and military officers and enlisted men are made subject to military law and to civil liability for damages in certain cases. Requirements of bond and amenability to criminal penalties for specified breaches of duty are specified in the case of diplomatic officers and consuls.

alties for assaulting or serving out process against public ministers, in "violation of the law of nations," (1 stat. 117, sec. 25, 28; rev. stat. sec. 4062, 4064); Act, June 5, 1794, authorizes the president to expel foreign vessels in cases in which "by the law of nations" they ought not to remain, (1 stat. 384, sec. 8, Act, Apr. 20, 1818, 3 stat. 447, sec. 9; rev. stat. sec. 5288; Penal Code of 1910, Act, March 4, 1909, 35 stat. 1088, sec. 15); Act March 3, 1819, prescribes punishment for committing piracy "as defined by the law of nations," (3 stat. 513, sec. 5; rev. stat., sec. 5368; Penal Code of 1910, sec. 290); Act, Aug. 29, 1842, permits federal courts to release on habeas corpus, from state courts, persons claiming any right "the validity and effect of which depends upon the law of nations," (5 stat. 539; rev. stat. 703); Joint Resolution, March 4, 1915, authorizes the president to prevent the territory of the United States being used as a base of military operations "contrary to the obligations imposed by the law of nations," (38 stat. 1226).

(4) In the same manner private persons are made subject to criminal prosecution for violating neutrality, for assaulting foreign ministers, for committing offenses against foreign states such as counterfeiting foreign securities, or for committing piracy.

Rules in these two classes are not, for the most part, rules of international law, but rules supplementary to international law. International law does not prescribe the means to be employed by the state in compelling persons under its jurisdiction to observe the rules it lays down, but if they are not properly observed it holds the state responsible. The enactment and enforcement of such rules are therefore of great importance in giving legal sanction to international law. Especially are such statutes necessary in the United States in view of the fact that federal courts have no criminal jurisdiction except in so far as has been conferred by statute.

Statutes defining boundaries, recognizing states, declaring war, making appropriations to pay indemnities, etc., although of great international importance are to be regarded as determinations by congress of political questions. They do not furnish permanent rules for the enforcement of international obligations, although they may recognize specific international duties.

(3) *Executive Orders.*

Executive orders have been, for the most part, similar in character to statutes of the third class. They are supplementary to statutes, generally giving administrative rules in greater detail for the guidance of public officers. Instructions and regulations for diplomatic, consular, naval and army officers are illustrations of rules of this character.

(4) *Judicial Decisions.*

In practice the courts of the United States have given most marked recognition and sanction to the rules of international law. American courts from the earliest time have given voice to the doctrine that international law is law in the United States and must be applied by the courts in appropriate cases. The philosophy basing law on natural rights, so prominent among the founders of the Republic, found expression throughout its constitutional system. There was, it is true, confusion of thought as to the sources of natural law. The voice of the people, as expressed in written constitutions limiting the powers of government, was considered the final criterion by many. The

courts, however, have tended to recognize natural rights, based on precepts of morality or reason, to have legal force, even when not so expressed. Thus while enforcing the authority of constitutions as against legislatures by declaring statutes contrary to them void, they have sometimes expressed the opinion that certain fields of legislation are barred by a higher law, not expressly stated in the constitution.[6]

The theory by which international law is applied by the courts bears a very close relation to this philosophy. In the eighteenth and early nineteenth centuries, international law was often considered a branch of natural law.[7] If natural law was a

[6]Goshen vs. Stonington, 4 Conn. Rep. 209, 225; Wilkinson vs. Leland, 2 Pet. 627; Terrett vs. Taylor, 9 Cranch 43; Ham vs. McClaws, 1 Bay 98 (S. Car. 1789) Bowman vs. Middleton, 1 Bay 254 (S. Car. 1792); Regents of University vs. Williams, 9 Gill. and J. 365; Mayor of Baltimore vs. State, 15 Md. 376; Benson vs. Mayor of New York, 10 Barb. 244; Robin vs. Hardaway, Jeff. Rep. 109, 113, (Va.); Page vs. Pendleton, Wythe, Rep., 211, (Va. 1793); Quincy, Rep. 200, 474, App. 520, (Mass. 1761-1772); Scott vs. Sanford, 19 How. 393, 556; Downes vs. Bidwell, 182 U. S. 244, 282. The superior authority of natural law was denied in Calder vs. Bull, 3 Dall. 386. English authority for a similar doctrine see, Day vs. Savadge, Hobart, 85, 87; Calvin's Case, 7 Rep. 1; City of London vs. Wood, 12 Mod. 669, 687; Bonham's Case, 8 Rep. 114 a, 4 Rep. 234; Rawles vs. Mason, Rich. Brownlow, Rep. 187, 652. See Doctor and Student, written about 1540, London, 1746, p. 14; Blackstone upholds the superior authority of natural law, (Commentaries, 1;41) but admits later that such laws can not render an act of parliament void so far as municipal law is concerned. (Ibid. 1;91). James Wilson, Works, J. D. Andrews, ed., 2 vols., Chicago, 1896, p. 415; T. M. Cooley, a Treatise on Constitutional Limitations, 7th ed., Boston, 1903, p. 164; J. B. Thayer, Cases on Constitutional Law, 2 vol., Cambridge, 1895, 1;1; A. L. Lowell, Essays on Government, Boston, 1889, p. 169; A. C. McLaughlin, The Courts, the Constitution, and Parties, Chicago, 1912, pp. 63-99; Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation, Philadelphia, 1893, pp. 172, 189, 227, 234. C. G. Haines, The Conflict over Judicial Power in the United States to 1870, Columbia University Studies in History, Economics and Public Law, (1909), 35;16-36; C. G. Haines, The American Doctrine of Judicial Supremacy, New York, 1914, pp. 18-24, C. H. McIlwain, The High Court of Parliament, N. Y., 1910, pp. 97-108.

[7]Pufendorf, (1632-1694), Burlamaqui, (1694-1748), and the modern writer Lorimer derived international law exclusively from natural law. Blackstone takes a similar view, Commentaries, 1;43, 4;36. For other writers in the "natural law school" of international law see Bonfils, op. cit., p. 64; A. S. Hershey, History of International law since the Peace of Westphalia, Am. Jour. Int. Law, 6;30, (1912). For American writers

higher law to which courts must give effect, so was international law, although, in the United States, judicial opinion seems never to have gone the length of holding that it must be applied even when in derogation of express statute.[8]

Chief Justice Marshall always maintained that the courts apply national law alone, but by the regard which he showed for international comity,[9] and by the stand he took that international law is incorporated into the law of the United States and must be applied unless expressly changed by legislation, he showed the influence of the theory of a higher law.[10]

asserting this view, see James Wilson, Works, 1;28,34; W. J. Duane, The Law of Nations investigated in a popular manner addressed to the farmers of the United States," Philadelphia, 1809, p. 7-8. Discussion of "The Influence of the law of nature upon international law in the United States," Jesse Reeves, Am. Jour. Int. Law, 3;547, (1909).

[8]The obligation of courts to apply international law was derived from the theory of natural law in a number of cases of the latter eighteenth century. See Rutgers vs. Waddington, Mayor's court of N. Y., 1784, Thayers, cases, 1;63; Res Publica vs. DeLongchamps, 1 Dall. 111, (Pa. 1784); In re Henfield, Fed. Cas. 6360; Ware vs. Hylton, 3 Dall. 199. British Prize courts sometimes asserted that they must apply international law even when conflicting with executive orders. The Recovery, 6 Rob. 348; The Maria, 1 Rob. 350; Le Louis, 2 Dods. 239; The Annapolis, 30 L. J. Pr. M. and Ad. 201; Phillimore, International Law, 3; sec. 436. "In the Minerva (circa 1807) Sir J. Mackintosh, then Recorder of Bombay, and acting under a Commission of Prize, spoke of its being the duty of the judge to disregard the instructions, supposing them illegal, and to consult only that universal law to which all civilized Princes and States acknowledge themselves to be subject." Holland, Studies, p. 197, citing Life of Sir. J. Mackintosh, 1;317. See also supra p. 147.

[9]Schooner Exchange vs. McFaddon, 7 Cranch 116.

[10]Talbot vs. Seaman, 1 Cranch 1, 37; Murray vs. The Charming Betsey, 2 Cranch 64, 118; The Nereide, 9 Cranch 388, 423; The Antelope, 10 Wheat. 66, 120. The reception of international law into the law of the United States has been based on three theories, or four if we include the one just mentioned which really asserts the authority of a "higher law" superior to international law. These are: (1) International law was part of the common law and was accepted with it. "The first craft that carried an English settler to the new world was freighted with the common law, of which the law of nation was and is a part." J. B. Scott, Am. Jour. Int. Law, 1;857, (1907); "It is indubitable that the customary law of European nations is a part of the common law, and by adoption, that of the United States," A. Hamilton, Letters of Camillus, No. 20, Works, Lodge, ed., 9 vols., N. Y. 5;89. (2) International law was impliedly received by the terms of the constitution. "The Federal constitution provides that congress shall have power to define and punish offenses against

Throughout the history of the United States, the courts have in theory maintained this view, which was never more emphatically pronounced than in 1900 by the supreme court in the case of the Paquete Habana.[11] And that the courts have in practice made serious efforts to discover the rule of international law applicable to the case in hand, is indicated by the character of the formal sources of law to which they have habitually turned in rendering opinions upon facts appearing to involve international law. Thus the works of publicists, of which those of Vattel, Bynkershoek, Grotius, Wheaton and Kent are probably the most frequent, have been freely cited.[12] Treaties have been frequently adverted to, as well as statutes and court decisions of foreign countries, of which those of Great Britain are by far the most numerous.[13] Historical accounts of international

the law of nations and to make rules concerning captures on land and water. Furthermore it is declared that treaties made under the authority of the United States shall be the supreme law of the land. The effect of these clauses which recognize the existence of a body of international laws and the grant to congress of the power to punish offenses against them, the courts have repeatedly held is to adopt these laws into our municipal law en bloc, except where congress or the treaty making power has expressly changed them." W. W. Willoughby, Am. Jour. Int. Law, 2;365. (3) International law itself and the privilege of membership in the family of nations, put the courts of the United States under an obligation to apply international law in appropriate cases. "The statesmen and jurists of the United States do not regard international law as having become binding on their country through the intervention of any legislature. They do not believe it to be of the nature of immemorial usage, 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. - - - If they put it in another way it would probably be that the state which disclaims the authority of international law places herself outside the circle of civilized nations." Sir H. S. Maine, International Law, N. Y., 1887, p. 37. To similar effect, Phillimore, op. cit. 1;78; Secretary of State Jefferson to Genet, French Minister, 1793, Am. St. Pap. For. Rel. 1;150; Assist. Secretary of State Rives to Mr. McGarr, For. Rel. 1888, pt. 1, pp. 490, 492; Moore's Digest, 1;1-11; See also cases cited, supra p. 16, note 10 and statutes cited p. 221, note 5.

[11]The Paquete Habana, 175 U. S. 694, (1899).

[12]Other publicists frequently quoted have been Pufendorf, Rutherford, Wicquefort, Wolf, Halleck, Calvo, Perels, Hall.

[13]On the authority of British prize precedents in United States courts see Chief Justice Marshall in Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch 191, (1815). During the Civil war Lord Stowell's prize decisions were relied on almost entirely.

practice have also sometimes been cited as evidence of the rule of international law on the subject in question.[14]

The general principles which the courts of the United States have applied in cases involving international law may be summarized as follows: (1) international law should furnish the rule of decision in all appropriate cases where there is no constitutional provision, statute, or executive order, authorized by statute, in direct conflict; (2) treaties are an immediate source of law on a par with statutes, a later treaty overruling an earlier statute and vice versa; (3) statutes and executive orders when appearing to conflict with international law should be interpreted, if possible, in harmony with the rule of international law.

It must always be borne in mind that these rules can only apply to that portion of customary and conventional international law which, by its nature, is applicable immediately to controversies between parties, subject to the jurisdiction of the court. It is therefore of the highest importance to consider what fields of international law the courts consider in this class. Clearly if the court conceived of the bulk of international law as rules prescribing conduct for the sovereign power alone, that is as "political questions", these liberal principles would be of little practical effect.

The view of the courts in this respect can only be inferred from their practice. We have, therefore, given much consideration in this thesis to the question, "From what fields of international law have the courts actually drawn rules for the decision of cases?"

These fields in which international law has been actually applied by the courts may be classified as (1) cases relating to jurisdiction, (2) cases relating to the rights of the inhabitants of newly acquired territory, and (3) prize and maritime cases. By defining the limits of national jurisdiction, according to international law, by refusing jurisdiction of extraterritorial offenses, and suits against foreign sovereigns; by refusing to give extraterritorial effect to laws and by assuming jurisdiction over prizes of war, courts have enforced duties of international law. The same is true where courts have supported vested rights and applied the existing law for the benefit of the inhabitants of acquired territory. In determining prize cases, the courts have in general made a faithful effort to apply international law as

[14] In the Paquete Habana, 175 U. S. 694, Justice Gray makes extensive citations from all of the kinds of sources mentioned.

their theory demanded, although exception should be made in some of the Civil war cases. So long as international law has to be applied by national tribunals it can not but be warped by its proximity to considerations of policy and the inevitable partisanship of officers, who owe a primary duty to one of the litigant states.

DIVISION OF POWER BETWEEN STATE AND NATIONAL GOVERNMENTS

The division of power between the state and national governments has at times resulted in an inability to perform obligations required by international law. The state governments, not having international relations, and not feeling the pressure of international public opinion, cannot be relied on to enforce duties of international law. It would seem, however, that under the constitution the national government may exercise all powers necessary to make treaties and obligations of international law effective. The difficulty lies in the failure of congress to act, rather than in a constitutional impossibility.

The United States has provided in its municipal law for the enforcement of numerous rules of international law. How completely the field is covered we will not venture to assert. To define exactly what obligations are actually imposed by international law at any particular time is almost impossible. The field of international law is constantly growing. Matters yesterday considered entirely internal today entail international responsibility and are regulated by international law. Judicial and administrative officers must therefore take continuous cognizance of the development of international law to insure that they apply it in appropriate cases, so far as compatible with their duties as national officers; and congress must be constantly on the lookout for new international duties which require supplementary legislation to be made effective. The failure to provide such necessary municipal measures does not relieve the state from international responsibility if a breach of international law should occur.

IMPORTANCE OF MUNICIPAL ENFORCEMENT OF INTERNATIONAL LAW

The municipal enforcement of international law is a matter of great importance from the standpoint both of international law and of national policy. There are no administrative or judicial authorities with coercive power except those of territorial states. The growth of international unions and admin-

istrative organs has been rapid in the last few years, but such bodies still rely on states for effectiveness. Power is essential to effective sanction[15] and power is still controlled by states exclusively. Rules of international law can not, therefore, be effective unless enforced by state authorities as municipal law.[16]

National policy likewise dictates the provision of municipal measures for enforcing international obligations. Since the Alabama claims arbitration it has been clear that lack of such laws will not relieve the state from responsibility. Liability to indemnity, reprisal or war can only be avoided by a strict observance of international duty, and this observance can in many cases be assured only by adequate provisions of municipal law.

[15]Robert Lansing, Notes on Sovereignty in a State, Am. Jour. Int. Law, 1;105-128, 297-320, emphasizes the importance of physical power in the sanction of law.

[16]Though not incorporated into municipal law, rules of international law may be law in the sense of being rules of great authority generally observed. They would occupy the position which Maine assigns to the Brehon laws of ancient Ireland. "The Law of Distress was clearly enough conceived by the Brehon lawyers, but it depended for the practical obedience which it obtained on the aid of public opinion and of popular respect for a professional caste. Its object was to force disputants to submit to what was rather an arbitration than an action, before a Brehon selected by themselves, or at most before some recognized tribunal advised by a Brehon." Sir H. S. Maine, Early History of Institutions, p. 286. See also ibid. pp. 52, 252.

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LIST OF CASES

VITA.

Philip Quincy Wright, the author of this thesis, was born at West Medford, Massachusetts, December 28, 1890; prepared for college in the public schools of Galesburg, Illinois, and received the degree of Bachelor of Arts from Lombard College of that place in 1912. From 1912 to 1915 he attended the University of Illinois, the first year as a scholar, the second and third as a fellow in political science. He received the Master's degree in political science from that institution in 1913, having completed a thesis upon the subject of "Prize Money".

During the year 1914, under the direction of Professor John A. Fairlie, he prepared a "Report on the Military Department of the State of Illinois", and compiled data on the control of natural resources by the states, both for the Efficiency and Economy Committee of the State of Illinois, and published in the report of that committee.